CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

SPRING TERM, 1929

T. G. HYMAN v. N. L. BROUGHTON.

(Filed 3 April, 1929.)

1. **Sales A a—Evidence of total worthlessness of article sold admissible to show failure of consideration—Warranties.**

   Where a seller contracts for the sale of a cotton gin and delivers to the purchaser an article that is worthless except for junk, there is a failure of consideration, and evidence that the gin was worthless except for junk is admissible in the seller's action for the purchase price.

2. **Sales H d—Vendee may not set up counterclaim for breach of warranty when contract contains no express warranty and excludes parol.**

   The vendee may not recover damages for the delivery of a cotton gin on the ground that it was inferior in quality to the one purchased in the face of a stipulation in the written contract of sale that any agreement, verbal or otherwise, not in the writing would not be considered.

3. **Sales H e—When the article sold is worthless vendee is not bound by stipulation that notice of defect be given vendor—Fraud.**

   Where the article sold is worthless there is a failure of consideration and the vendee may resist the vendor's action for the purchase price without alleging or proving fraud in the procurement of the contract or compliance with a stipulation of the contract requiring notice of defects and an opportunity to remedy same, be given the vendor.

CIVIL ACTION, before *Nunn, J.,* at November Term, 1928, of CRAVEN.

The plaintiff instituted an action against the defendant to recover the sum of $2,000 evidenced by four promissory notes in the sum of $500 each. The notes were given in payment of the purchase price of a certain gin sold by the plaintiff to the defendant. The contract of sale was in writing, containing the usual stipulation that "no agreement, oral or otherwise, other than is set forth herein, forms any part of this contract." The defendant admitted the execution of the notes, but denied that he was indebted to the plaintiff by reason of the fact that the plaintiff "represented, warranted and guaranteed . . . a certain gin equipment; . . . that same was practically new and in number one condition, . . . when in truth and in fact said gin and equipment was in bad condition; . . . that said engine is still unsatisfactory and cannot be operated but a very short time without overheating and is not only unsatisfactory, but worthless and of no value."

The defendant further alleged "that by reason of the wrongful misrepresentation by the plaintiff and breach of said warranties, all of which were relied on by the defendant, the defendant has sustained a loss of $700, money expended on repairs and transportation, and $2,000 loss of earnings on account of not being as represented and warranted," etc.

There was a written warranty on the back of the sales contract providing in substance that if the machinery did not give satisfaction notice should be given in a reasonable time to enable the vendor to remedy any defect. The defendant offered evidence tending to show that the vendor was informed of the purpose for which this machinery was to be used, and that it could not be used during the season at all; that the motor could not be put in condition to run; that the motor could not be started." All of this testimony was excluded by the court.

One witness for defendant testified that he "did not consider the engine worth anything—only junk." Another witness testified: "Engine worth only junk price at time I started to work on it. Worthless as a running engine."

At the conclusion of the testimony the trial judge directed the jury to answer the issue in favor of plaintiff in the sum of $2,000 with interest.

From judgment rendered the defendant appealed.

Whitehurst & Barden for plaintiff.

T. A. Banks, Ward & Ward and Smith & Joyner for defendant.

BROGDEN, J. The contract of sale was in writing and contained the usual stipulation that no oral agreement formed any part of the contract. The allegations in the counterclaim or cross-action of defendant are not sufficient to raise the issue of fraud in the inducement of the contract. *Colt v. Kimball,* 190 N. C., 169, 129 S. E., 406; *Colt v. Conner,* 194 N. C., 344, 139 S. E., 694. However, the defendant contends that in all sales of personal property without inspection there is an implied warranty that the property can be used for the purpose for which it was purchased. It is to be observed that there was an express warranty contained in the contract. The law is that "an express warranty of quality will exclude an implied warranty of fitness for the purpose intended; but an express warranty on one subject does not exclude an implied warranty on an entirely different subject, an illustration of the latter being, that an express warranty of title will not exclude an implied warranty of soundness or merchantability. We have recognized the principle that there can be no implied warranty of quality in the sale of personal property where there is an express warranty, and that where a party sets up and relies upon a written warranty he is bound by its terms and must comply with them *(Main v. Griffin,* 141 N. C., 43), and the further principle, applied by us in that case, that a failure by the purchaser to comply with the conditions of the warranty is fatal to a recovery for breach of the warranty in an action on it, or where, as in this case, damages for the breach are pleaded as a counterclaim in an action by the seller for the purchase money." *Guano Co. v. Livestock Co.,* 168 N. C., 442, 84 S. E., 774.

The defendant in his counterclaim or cross-action does not allege or offer evidence tending to show that notice was given to the vendor as required by the written warranty, but the defendant says that this principle does not apply because the property was utterly worthless and that he attempted to offer competent evidence to that effect, which was erroneously excluded by the court. This aspect of the case is governed by the principle declared in *Swift v. Aydlett,* 192 N. C., 330, 135 S. E., 141. "It ought not and cannot be held as law that a vendor who has sold a well-known article which has value only for a definite, specific purpose, by implication of law, warrants that the article delivered is the article sold, and may in the contract of sale stipulate that he shall be relieved of his obligation to deliver the very article which he has agreed to deliver in performance of his contractual obligation." In other words, if a vendor contracts to sell a gin, he cannot receive the purchase money for a gin and deliver junk. Such transaction would result in a total failure of consideration for the note evidencing the purchase price. Of course, in the absence of fraud, the defendant cannot recover upon his counterclaim in the light of the facts presented in the record, merely because the gin was of poorer quality of workmanship than he anticipated. His right to recover upon the record as now presented depends entirely upon the application of the principles of law announced in the *Aydlett case, supra*, and the case of *Furniture Co. v. Mfg. Co.*, 169 N. C., 41, 85 S. E., 35.

The evidence of the worthlessness of the property or total failure of consideration of the note sued on should have been submitted to the jury with proper instructions from the court. Failure to do so constituted error, and a new trial is awarded.

New trial.

STATE OF NORTH CAROLINA v. SUNCREST LUMBER COMPANY ET AL.

(Filed 3 April, 1929.)

1. **Statutes A b—Statute creating Park Commission Constitutional.**

   The provisions of the act creating the North Carolina Park Commission are constitutional and valid. Chapter 48, Public Laws of 1927.

2. **Eminent Domain B a—State is proper party in condemnation proceedings by Park Commission—Demurrer.**

   Under the provisions of chapter 48, Public Laws of 1927, the North Carolina Park Commission is neither a body politic nor corporate in the ordinary sense, but an agency of the State clothed with the power of eminent domain to be exercised in behalf of the State and in its name, and a demurrer to the petition of the State in condemnation of lands for the purposes of the act, on the ground that the commission and not the State was the proper party, is bad.

3. **Eminent Domain B a—Verification of petition in condemnation proceedings by Park Commission properly made by its chairman.**

   The verification of a petition, in a proceeding to condemn land for the purpose of a park authorized by chapter 48, Public Laws of 1927, to restrain cutting of timber on land sought to be condemned, is properly made by the chairman of the North Carolina Park Commission.

APPEAL by respondents from *McElroy, J.*, at Murphy, N. C., 21 January, 1929. From BUNCOMBE.

Special proceeding, instituted by virtue of chapter 48, Public Laws 1927, to condemn lands for park and recreational purposes in the Great Smoky Mountains of North Carolina.

The substance of the petition is:

1. That the State of North Carolina is one of the sovereign States of the United States of America, clothed with the right of eminent domain, subject to its Constitution and laws enacted in pursuance thereof, and that by virtue of an act of the General Assembly of North Carolina, ratified 25 February, 1927, entitled "An act to provide for the acquisition of parks and recreational facilities in the Great Smoky Moun-

tains of North Carolina," the same being chapter 48, Public Laws 1927, the petitioner is vested with the power of acquiring in the name of and in behalf of the State of North Carolina, and to condemn for park purposes, lands and other properties, located or situate within the area of the Great Smoky Mountains as described and set out in the act above mentioned.

2. That the respondents are the owners of certain tracts of land situate in said area, and that the Suncrest Lumber Company is now engaged in cutting the timber on the lands sought to be condemned, which will enormously diminish its value for park purposes unless restrained from such cutting.

Wherefore, the petitioner asks for condemnation against the respondents and restraint from further timber-cutting on the part of the Suncrest Lumber Company.

The petition is verified by the chairman of the North Carolina Park Commission, who alleges that he is duly authorized to make such verification.

A demurrer was interposed by the respondents on the grounds:

1. That there is a defect of parties plaintiff, in that, the proceeding, if validly authorized at all, should have been instituted by the North Carolina Park Commission and not by the State itself.

2. That the petition does not state facts sufficient to constitute a cause of action against the respondents, or any one of them, as the State of North Carolina has not been duly authorized to institute the proceeding, and further it does not appear from the petition that the chairman of the North Carolina Park Commission is an officer of the State or has any power or authority to verify said petition.

From a judgment overruling the demurrer and continuing the restraining order to the hearing, the respondents appeal, assigning error.

Attorney-General Brummitt and Assistant Attorney-General Varser for petitioner.

Byron F. Ely, Thos. S. Rollins, J. Bat Smathers and Alfred S. Barnard for respondents.

STACY, C. J., after stating the case: The constitutionality of chapter 48, Public Laws 1927, was asserted in *Yarborough v. Park Commission,* 196 N. C., 284, 145 S. E., 563, and *Suncrest Lumber Co. v. North Carolina Park Commission,* 29 Fed. (2d), 823, S. c., 30 Fed. (2d), 121.

These cases also hold that the North Carolina Park Commission, while denominated in the act as a "body politic and corporate," is not a municipal or private corporation in the ordinary sense, but rather an agency of the State clothed with the power of eminent domain to be exercised on behalf of the State of North Carolina and in its name. Section 18. The demurrer, therefore, was properly overruled on the first ground.

Likewise, on authority of these same cases, the demurrer was properly overruled on the second ground set out therein. It would serve no useful purpose to repeat what has been so recently said in the cases cited. They apparently dispose of all the questions debated before us.

In considering the present appeal, we are restricted to the grounds specified and designated in the demurrer. C. S., 512; *Glass Co. v. Hotel Corp., post,* 10; *Seawell v. Cole,* 194 N. C., 546, 140 S. E., 85.

Affirmed.

NEW HOPE REALTY COMPANY v. ED BARNES AND ALEX BARNES.

(Filed 3 April, 1929.)

1. **Injunctions D b—Irreparable injury grounds for continuing order restraining building contrary to covenant in deed to final hearing.**

   Where injunctive relief is sought to restrain the violation of warranties and covenants in deed restricting the location of residences on a lot sold in a development plan under a deed duly recorded, and a serious question is presented as to whether such violation would cause substantial and irreparable injury to the development company, the restraining order will be continued to the hearing until the matters may be determined at the trial.

2. **Appeal and Error J d—Burden of showing error on appellant.**

   While the burden is on the plaintiff in an action seeking injunctive relief to show irreparable injury entitling him to the equitable relief sought, where the equity has been granted in the Superior Court, it is upon the appealing defendant to show error in the Supreme Court.

APPEAL by defendants from *Devin, J.,* at Chambers, 20 September, 1928, September Term, 1928, of DURHAM. Affirmed.

This is a civil action brought by plaintiff in which injunctive relief was prayed against defendant, Alex Barnes, the owner of lots 27 and 28, as shown on the plat of the South Street property of the plaintiff, and Ed Barnes, a contractor, to stop constructing a house for Alex Barnes on said lots facing on an unnamed street, in violation of a covenant in a certain deed made by plaintiff to one R. L. McDougald. The deed was made and executed by plaintiff to the said McDougald on 14 March, 1927, and was duly recorded in the office of the register of deeds for Durham County in Book 74, p. 659. The deed contained the following covenant: "It is expressly understood and agreed by the parties hereto that any residence erected or placed on the above-mentioned lot shall face South Street, and that no residence shall be constructed or licensed to be erected on said lots or front on said unnamed street, this being one of the conditions in the sale of the above property, and this agreement is hereby made a covenant running with the land."

The defendant, Alex Barnes, purchased the above-named lots in the development from R. L. McDougald, "without any restrictive covenants whatsoever." Alex Barnes conveyed one-half interest to one Pratt.

The plaintiff alleges: "That if the said Ed Barnes and Alex Barnes are allowed to continue the construction of the said house, the plaintiff's property will be greatly damaged thereby; that the erection of the said house by the said defendants will greatly injure the beauty and attractiveness of the said Forest Hills, and will be a continuous aggravation to the plaintiff, and will usurp the plaintiff's rights and be a great damage to the value of the said property owned by the plaintiff, for the reason that the value of the said property consists largely in the beauty and attractiveness of the lots as they are situated on the plaintiff's said development. That if the defendants are allowed to continue the erection of the said dwelling the plaintiff will be irreparably injured."

There was evidence to sustain plaintiff's allegations. The defendants denied the allegations of plaintiff and there was evidence introduced by defendants to sustain their contentions.

W. S. Lockhart for plaintiff.
R. McCants Andrews for defendants.

CLARKSON, J. The plaintiff contends that the question involved: "Is this covenant of such a nature as to justify a restraint of its violation until all questions of fact relating thereto can be determined?" We think so.

Ordinarily, the right to injunctive relief to compel the observance of covenants and restraintive clauses, is recognized in this jurisdiction. *Church v. Bragaw,* 144 N. C., 126; *Guilford v. Porter,* 167 N. C., 366; *Bradshaw v. Millikin,* 173 N. C., 432; *Davis v. Robinson,* 189 N. C., 589; *Nye v. Williams,* 190 N. C., 129.

In *Wentz v. Land Co.,* 193 N. C., at p. 34, it is said: "On the record, as to material facts, there is serious conflict. In injunction proceedings this Court has the power to find and review the findings of fact on appeal, but the burden is on the appellant to assign and show error, and there is a presumption that the judgment and proceedings in the court below are correct." *R. R. v. Transit Co.,* 195 N. C., 305.

In *Ohio Oil Co. v. Conway, Supervisor of Public Accounts, et al.* (La.), U. S. Supreme Court, per curiam opinion filed 5 March, 1929, speaking to the subject, it is said: "But enough appears to make it plain that there is a real dispute over material questions of fact which cannot be satisfactorily resolved upon the present affidavits and yet must be resolved before the constitutional validity of the amendatory statute can be determined. . . . Where the questions presented by an application for an interlocutory injunction are grave, and the injury to the moving party will be certain and irreparable if the application be denied and the final decree be in his favor, while if the injunction be granted the injury to the opposing party, even if the final decree be in his favor, will be considerable, or may be adequately indemnified by a bond, the injunction usually will be granted. *Love v. Atchison, T. & S. F. Ry. Co.,* 185 Fed., 321, 331-332."

The defendants have filed an elaborate brief, but inapplicable on the present state of the record. On the record as to material facts there is serious conflict. The burden is on defendants to assign and show error. The presumption is that the judgment and proceedings in the court below are correct. For the reasons given the judgment of the court below is

Affirmed.

MATTIE J. GILLIKEN, EXECUTRIX, v. GEORGE D. NORCOM AND WIFE, BESSIE NORCOM ET AL.

(Filed 3 April, 1929.)

Deeds and Conveyances A g—Evidence of mental incapacity to make deed held for jury—Undue Influence—Fraud.

In an action by the grantor's daughter-in-law and devisee to set aside a deed to the unrelated tenant of the grantor, evidence that tends to show that the grantor was a woman seventy-one years of age, feeble in body, easily influenced, and with the mind of a child, and that the consideration recited in the deed was ten dollars and other consideration, and the grantor refuses to testify as to the amount of the consideration paid: *Held,* sufficient to take the case to the jury under proper instructions from the court.

CIVIL ACTION, before *Nunn, J.,* at October Term, 1928, of CRAVEN.

The plaintiff, Mattie J. Gilliken, is the daughter-in-law of the deceased, Mary E. Davis. Mary E. Davis had one son who married the plaintiff in 1905, and who lived with his mother until his death in 1919. The plaintiff lived with her mother-in-law, Mary E. Davis, until March, 1923, when she married William L. Gilliken and then moved away. Mary E. Davis died on 12 June, 1924, leaving a last will and testament devising to the plaintiff a tract of land containing about 50 acres. On

23 July, 1923, or about eleven months before her death, Mary E. Davis executed a deed for said land to the defendant, George D. Norcom, which deed recited a consideration of ten dollars and other valuable consideration. Norcom was a tenant of the grantor and was not related to her by blood or otherwise.

The plaintiff brought a suit to set aside said deed, alleging that at the time said deed was made that the grantor, Mary E. Davis, was without sufficient mental capacity to execute a deed, and furthermore, that the defendant exerted undue influence in procuring said deed. At the conclusion of the testimony for plaintiff a judgment of nonsuit was entered, from which the plaintiff appealed.

Abernethy & Abernethy and Ward & Ward for plaintiff.
C. R. Wheatley and J. F. Duncan for defendant.

BROGDEN, J. The sole question presented is whether there was sufficient evidence of mental incapacity to be submitted to the jury.

The law recognizes the same standard of mental capacity for testing the validity of both deeds and wills, although it is suggested that perhaps a court would scrutinize a deed more closely than a will. *Bond v. Mfg. Co.,* 140 N. C., 382, 52 S. E., 929. The degree of mental capacity requisite for the valid execution of a deed is thus stated in *Lamb v. Perry,* 169 N. C., 436, 86 S. E., 179: "A want of adequate mental capacity of itself vitiates the deed, while mere mental weakness or infirmity will not do so, if sufficient intelligence remains to understand the nature, scope and effect of the act being performed. But while this is true, weakness of mind, whether natural or induced by the excessive use of drugs or any other cause, when accompanied by such circumstances as tend to show what advantage was taken of it by the party who procured the deed, or when it appears that there is not only weakness of mind, but inadequacy of consideration, especially when it is gross, and the situation of the parties is so unequal, by reason of the weakness of the one and the mental superiority of the other, or for other reason, the jury may infer fraud, or undue influence, which in law is the same thing."

The evidence tended to show that the deceased at the time of executing the deed was about seventy-one years of age and was suffering with paralysis. "Her physical condition was very bad, and her mental condition just about like a child—just as childish as could be. She was deaf and could not hear. From about the first of 1923, until her death, her sense was about like that of a little child; seemed she couldn't remember. Most anybody could influence her. She had hardly any mind in June, 1924. Prior to her death she was perfectly helpless and had no mind."

A physician, who treated Mary E. Davis, the grantor, in the fall of 1923, testified that "she was childish and her mentality was below that of a twelve-year-old child. . . . You could not reason with her; she was more like an irrational child than an intelligent woman."

Another physician, who treated the grantor at the time she was crippled in October or November, 1922, testified "that at that time her mind was not any better than that of a twelve-year-old child."

Another witness testified that prior to March, 1923, "the mental condition . . . of Mrs. Davis was not more than a child's; could be persuaded almost any way by almost anybody; didn't have sense enough to know when she was right or wrong till it was too late."

There was testimony that the property was worth $5,000. The deed recited a consideration of $10. The defendant testified in his own behalf and was asked by the court what he paid for the land. He replied: "I gave her a consideration."

It is our opinion that the evidence should have been submitted to the jury with proper instructions from the court.

Reversed.

PITTSBURGH PLATE GLASS COMPANY v. HOTEL CORPORATION ET AL.

(Filed 3 April, 1929.)

1. **Fraud B c—Demurrer to reply alleging ratification of fraud should be overruled—Demurrer—New Cause of Action—Indemnity Bonds.**

   Where in an action to recover for material furnished the contractor for the erection of a building, involving the liability of the surety on the contractor's bond, the defense of fraud in the procurement of the bond was pleaded, to which the plaintiff replied alleging a compromise by the surety and the owner in a certain sum, to which last pleading a demurrer was interposed on the ground that it set up a new cause of action: *Held,* the alleged compromise being for the benefit of the material furnishers who were protected by the bond, it enured to their benefit, and was a ratification of the surety's liability on the original bond, and the demurrer was bad: and, *Held further,* the interpretation of the compromise agreement was not before the Supreme Court on this appeal.

2. **Appeal and Error E h—On appeal from the sustaining of a demurrer matters outside of pleading will not be considered.**

   On appeal from the sustaining of a demurrer the only question presented is the sufficiency of the pleading, taking its allegations to be true, and matters outside of pleading will not be considered.

APPEAL by plaintiff from *Cranmer, J.,* at December Term, 1928, of NEW HANOVER.

Civil action to recover for materials furnished by plaintiff and used by the contractor in the construction of a hotel in the city of Wilmington.

Plaintiff seeks to hold the Fidelity and Deposit Company of Maryland liable for its claim by reason of a $418,896 bond given for the faithful performance of the contract existing between Walter Clark, contractor, and G. L. Miller & Company, Inc., owner or representative of the owners of the building.

Liability of the surety is denied on the ground of fraud alleged to have been practiced in the procurement of said bond. The surety company further sets up, by way of defense, that upon certain conditions being performed by G. L. Miller & Company, a compromise agreement has been reached between the owners and the bonding company whereby the said surety is to be released from all claims, including plaintiff's, upon the payment of $40,000.

To this defense plaintiff replies, alleging, in substance:

1. That said compromise agreement necessarily inures to plaintiff's benefit and to the benefit of other creditors.

2. That such agreement, made with full knowledge of the facts, is a ratification of the original bond, so far as plaintiff is concerned, and waives any fraud that may have existed.

A demurrer was interposed to this reply of the plaintiff on the ground that it undertakes to set up a new cause of action not in existence at the time of the commencement of the suit; and further that said reply does not state facts sufficient to constitute a cause of action against the demurring defendant.

From a judgment sustaining the demurrer of the Fidelity and Deposit Company of Maryland and dismissing plaintiff's reply, the plaintiff appeals, assigning errors.

Peacock & Dawson, Cyrus D. Hogue and Bryan & Campbell for plaintiff.

Rountree & Carr and I. C. Wright for defendant, Fidelity and Deposit Company of Maryland.

STACY, C. J., after stating the case: The first appeal in this case was heard at the Spring Term, 1927, and is reported in 193 N. C., 769, 138 S. E., 143, reference to which may be had for a fuller statement of the facts.

Conceding, without deciding, that plaintiff may not recover in the present action on the alleged compromise agreement between the Fidelity and Deposit Company of Maryland and G. L. Miller & Company, still the demurrer was improvidently sustained, for it is alleged in plaintiff's reply that said compromise agreement was made with full knowledge of all the facts, and that such action on the part of the surety company amounted to a waiver of any fraud that may have existed, and constituted a ratification of the original bond so far as plaintiff is concerned. This is admitted by the demurrer. To strike out the reply, therefore, would deny to the plaintiff the right to show ratification, if it can.

The compromise agreement is not before us for construction, as we are not permitted to look beyond the allegations of the reply, or travel outside the scope of the demurrer, in dealing with the present appeal. *Furniture Co. v. R. R.*, 195 N. C., 636, 143 S. E., 242; *Brick Co. v. Gentry,* 191 N. C., 636, 132 S. E., 800.

A demurrer goes to the heart of a pleading and challenges the right of the pleader to maintain his position in any view of the matter, admitting, for the purpose, the truth of the allegations of fact contained therein. *Meyer v. Fenner*, 196 N. C., 476; *Wood v. Kincaid,* 144 N. C., 393, 57 S. E., 4.

Reversed.

MRS. J. E. WILLIAMS v. EASTERN CAROLINA COACH COMPANY ET AL.

(Filed 3 April, 1929.)

Trial E c—Court must charge law arising on all features of case—Negligence—Bus lines.

In an action to recover damages of a bus line where there is sufficient evidence tending to show that a passenger was injured by the negligence of the defendant in not providing an adequate catch or other device to prevent a folding seat from falling when raised, and that it fell upon the plaintiff's hand and caused the injury in suit; and also evidence that the injury thus inflicted was caused by the independent act of a fellow passenger or by the act of the plaintiff herself, a charge of the court correctly placing the burden of proof and generally defining the law of actionable negligence, etc., but omitting to explain the law arising upon the particular phases of the evidence, is not a compliance with the mandate of C. S., 564, requiring that the court instruct the jury on the law arising from all substantial features of the case, and constitutes reversible error.

APPEAL by defendants from *Harwood, J.*, at March Term, 1928, of UNION. New trial.

In the month of November or December, 1926, the plaintiff was a passenger on one of the motor vehicles of the defendant Coach Company going from Monroe to Charlotte. She occupied the seat next to the last seat at the rear of the coach. Connecting with the end of this seat, and extending across the passageway was a seat called a "flap seat," or "folding seat," which could be raised for the convenience of passengers going to and from the rear seat. It was attached to the wall by hinges; and there was evidence tending to show that a strap and snap were provided by which it could be held in an upright position. The plaintiff's right hand was resting on the end of the seat she occupied. There was evidence tending to show that when the bus turned into Jefferson Street it stopped to admit a passenger, and that when it turned into Charlotte Avenue the raised seat fell on the plaintiff's hand and inflicted injury from which she subsequently suffered.

In her complaint the plaintiff alleged that the defendant had negligently failed to provide for the fastening of the seat and had negligently left it unsecured when raised; that she was not given a safe place in which to ride, and that the driver was negligent in the operation of the bus. The material allegations were denied by the defendants; and at the trial the issues of negligence, contributory negligence, and damages were answered in favor of the plaintiff. The defendants excepted and appealed.

Vann & Milliken and John C. Sikes for plaintiff.
John W. Hester and W. B. Love for defendants.

ADAMS, J. As there was no error in overruling the motion for nonsuit, the pivotal question is raised by an exception to the charge upon the ground that his Honor failed to observe the requirements of section 564 of the Consolidated Statutes. This section makes it the duty of the judge to "state in a plain and correct manner the evidence given in the case and declare and explain the law arising thereon." It is contended that this mandate was disregarded in the instructions given the jury upon the first issue—a position which involves the consideration of the evidence pertaining to the issue, the charge in reference to it, and the principles of law which are deemed to be applicable.

There was evidence tending to show that the "folding seat" was a part of the seat occupied by the plaintiff, and that it could be raised on hinges against the wall for the benefit of passengers going to or from the rear of the coach; that it had no spring or other device for securing it to the wall; that it was raised and unsecured when the bus left the hotel; and that by the driver's negligence it was caused to fall upon and seriously to injure the plaintiff's hand. There was other evidence tending to show that the defendant had provided a strap and snap for keeping the folding seat in position when raised against the wall, and that the defendant had in other respects used due care to assure the safety of the plaintiff. It was contended, and there was evidence from which the jury might have inferred that the seat, if raised, had been raised by a passenger and left unsecured. Upon the evidence two diverse theories arose. It was argued by the plaintiff that the seat as constructed was inherently defective and unsafe; that the Coach Company was responsible for its condition and was negligent in maintaining it, and that the company's negligence was the proximate cause of the plaintiff's injury. The defendant insisted that the plaintiff's evidence was uncertain as to the position of the folding seat when she became a passenger; that she did not know whether it was up or down, fastened or unfastened; that it was in fact down when she came in, but if raised, that it had not been raised by the company, and that the defendant is not liable for an injury caused by an intervening agency.

Upon the first issue—whether the plaintiff had been injured by the negligence of the Coach Company—the trial judge correctly stated the law as to the burden of proof and as to the constituent elements of actionable negligence: (1) Want of due care, ordinary or due care being such as is commensurate with the hazards incident to the business; (2) injury to the plaintiff, and (3) proximate cause. He gave a synopsis of the material evidence, and a statement of the contentions. Then after telling the jury to consider the evidence he concluded his charge upon the first issue by saying that they should answer it in the affirmative if they found by the greater weight of the evidence that the Coach Company had been negligent, and that its negligence had proximately caused the plaintiff's injury, and if they did not so find to answer it in the negative. The identical instruction had previously been given; and these two were the only instructions pointing out the circumstances under which the issue should be answered "yes" or "no." Detached from this single proposition the remainder of the charge consists of nothing more than a definition of actionable negligence, a statement as to the burden of proof and of the degree of care required of public carriers of passengers, and an abridged recital of the evidence and of the contentions of the parties. For these reasons the charge does not satisfy the demands of the statute. Let us assume, merely by way of illustration, that the jury should find from the evidence, as insisted by the plaintiff, that the Coach Company failed in the exercise of due care to provide adequate means for securing the seat when raised to the wall, or to see that the seat was in other respects reasonably safe, or that the bus was carefully driven. Let us assume further, as contended by the defendant, that the seat was down when the plaintiff entered the bus and that a passenger afterwards raised it and carelessly left it unsecured, though a sufficient device for fastening it had been provided. The charge contains no rule or formula to aid the jury in determining which of these circumstances would or would not constitute negligence. The judge simply charged as to the plaintiff's contention that certain facts would make a case of negligence and the defendant's contention that other facts would not; but without appropriate instructions how could the jury know whether the facts as found did or did not amount to negligence as defined by the law?

Section 564 confers upon litigants a substantial legal right and calls for instructions as to the law upon all substantial features of the case. *Wilson v. Wilson,* 190 N. C., 819; *S. v. O'Neal,* 187 N. C., 22, 24. As was said in *S. v. Matthews,* 78 N. C., 523, 537, its requirements are not met by a general statement of legal principles which bear more or less directly, but not with absolute directness upon the issues made by the evidence. While the manner in which the law shall be applied to the evidence must to an extent be left to the discretion of the judge, he does not perform his duty if he fails to instruct the jury on the different aspects of the evidence and to give the law which is applicable to them, or if he omits from his charge an essential principle of law. *Blake v. Smith,* 163 N. C., 274; *Bowen v. Schnibben,* 184 N. C., 249.

In *Orvis v. Holt,* 173 N. C., 231, the defense was that the note sued on had been given for margins upon "futures." The judge instructed the jury that the burden of showing the illegality of the contract was on the defendant corporation, and if it had shown that the contract was illegal to answer the third issue "yes" and if not, to answer it "no." In reviewing the charge this Court said, *Walker, J.* writing the opinion: "We do not think this was an adequate charge or a compliance with the statute. All the evidence tended to show that the contracts for the pretended sales of cotton were condemned by our statute. Revisal, secs. 1689, 3823, 3824. There was no instruction or intimation to the jury as to what would be an illegal contract, and in this respect the jury were left, without any aid from the court, to pass upon the validity of the note according to their own notion of the law. The statute requires that 'The judge shall state in a plain and correct manner the evidence given in the case and declare, and explain, the law arising thereon.' This was not done. The jury were not told what would constitute an 'illegal consideration' or a 'gambling contract' under the statute in cases of this kind. Nor was anything of the kind said to them which was calculated to enlighten their minds upon this vital question in the case."

The case of *Nichols v. Fibre Co.,* 190 N. C., 1, was brought by an employee to recover damages for personal injury. The trial judge defined actionable negligence, stated the contentions at length, and concluded his charge without definite instructions as to the law. In an opinion written by *Connor, J.,* the Court said: "We do not find in the charge any instruction to the jury as to the law arising upon and applicable to the facts which they may find from the evidence. His Honor did not declare and explain the duties which the law imposed upon defendant as employer of plaintiff with respect to any of the matters involved in the allegations of negligence. Nor did he instruct the jury as to the law with respect to the breach of any of these duties, and the relation of such breach to the injuries as the proximate or concurrent cause thereof. The statement of the general principles of law, without an application to the specific facts involved in the issue, is not a compliance with the provisions of the statute. *Hauser v. Furniture Co.,* 174 N. C., 463; *S. v. Merrick,* 171 N. C., 788. . . . It is of course elementary that while the jury must determine the facts from the evidence, it is both the function and duty of the judge to instruct them as to the law applicable to the facts. The answers to the issues submitted in this case are not to be determined altogether by the facts; each issue involved matters of law, and the jury should have been instructed by the judge as to the law. While counsel may argue the law of the case to the jury, both plaintiff and defendant are entitled, as a matter of right, to have the judge declare and explain the law arising on the evidence. A failure to comply with the statute must be held as error."

Watson v. Tanning Co., 190 N. C., 840, also, is directly in point. There the trial court defined actionable negligence, gave the rule as to the burden of proof, fully stated the contentions of the parties, and instructed the jury to answer the issue of negligence in the affirmative if the plaintiff had satisfied them by the greater weight of the evidence that he had been injured by the negligence of the defendant as alleged, and if not, to return a negative answer. A new trial was granted, the Court saying: "In several cases recently decided we have stressed the necessity of observing the requirements of section 564 and have reiterated the suggestion that a statement of the contentions accompanied with the bare enunciation of a legal principle is not sufficient; it is imperative that the law be declared, explained and applied to the evidence."

A statement of the contentions of the parties is not required as a necessary part of the instructions *(Wilson v. Wilson, supra; S. v. Whaley,* 191 N. C., 387), but when the evidence is susceptible of several interpretations a failure to give instructions which declare and explain the law in its application to the several phases of the evidence is held for reversible error. Such failure is to be considered, not as a subordinate feature of the cause, but as a substantial defect which may be raised by an exception to the charge. *Hauser v. Furniture Co., supra; S. v. Merrick,* 171 N. C., 788. For the error complained of there must be a

New trial.

H. L. POTTER, BY HIS NEXT FRIEND, J. H. POTTER, v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 3 April, 1929.)

1. **Master and Servant E a—In action under Federal Employer's Liability Act Federal decisions apply.**

   In an action brought under the Federal Employers' Liability Act in the State Court against a railroad company to recover damages caused to a servant, the Federal statutes and decisions control.

2. **Master and Servant E b—Tools and appliances under Federal Employer's Liability Act—Negligence—Nonsuit.**

   The duty of a railroad company to provide for its employees engaged in interstate commerce reasonably safe and suitable cars, engines, appliances, machinery, track, roadbed, works, etc., "or other implements" as required by the Federal Employer's Liability Act is held to mean such instrumentalities and appliances as are personal or movable, or implements and appliances of manual operation, and where such negligent failure is relied on in respect to such "appliances," defendant's motion as of nonsuit will be granted unless there is some evidence that the implements complained of fall within the class intended by the Federal Statute.

3. **Master and Servant E b—Federal Employer's Liability Act—Safe place to work—Assumption of risk—Nonsuit.**

   While it is the nondelegable duty of the railroad company to furnish its employees engaged in interstate commerce a reasonably safe place to work, in the exercise of due care, the plaintiff's evidence is insufficient when it tends only to show that he was experienced in the work, and that the injury in suit occurred under the usual conditions ordinarily obtaining in like work, he being held to have assumed the risk under the Federal Employer's Liability Act, under which the action has been brought in the State Court, and defendant's motion as of nonsuit upon this evidence should be allowed.

APPEAL by defendant from *Cranmer, J.*, at September Term, 1928, of BRUNSWICK. Reversed.

The plaintiff, a minor 19 years of age, brought suit against the defendant to recover damages for personal injury alleged to have been caused by the negligence of the defendant. The defendant was engaged in interstate commerce; the plaintiff was in its employ; and the case was tried under the Federal Employers' Liability Act.

The plaintiff alleged in substance that he and other employees of the defendant were repairing a trestle spanning Hood's Creek, in Brunswick County, on the defendant's road extending from Wilmington through Navassa to Florence, South Carolina; that in the course of the work it was found necessary to remove pieces of timber called "bolsters" from their place under heavy timber which supported the cross-ties and the steel rails; that after the pieces were removed they were to be slidden towards the end of cap sills which rested on piling; that near the ends of each piece ropes were to be fastened, and then extended over the stringers or guard rails at the end of the cross-ties and given to men on the trestle; that the men were to raise the bolsters upon the trestle, pulling the rope over the guard rails; that while they were doing so one of the bolsters was caught under the end of cross-ties and the plaintiff was ordered to push it from the cross-ties and thereby to release it so that the men using the ropes could pull the bolster on the trestle; and that while in the act of obeying the order the plaintiff slipped or lost his balance, fell to the ground and was injured. He alleged, further, that the defendant was negligent in that it required him to release the bolster when the cross-ties and stringers were wet and slick, when the stringers were rounded on top, when the defendant had not furnished him any tools, appliances, or equipment and had not taken any other efficient measures to prevent him from falling, and that the defendant's negligence was the proximate cause of his injury.

The defendant answered the complaint denying the material allegations and pleaded contributory negligence and assumption of risk. The issues of negligence, assumption of risk and damages were answered in favor of the plaintiff and the issue of contributory negligence was answered in favor of the defendant. Judgment was given for the plaintiff and the defendant appealed, assigning error.

Bryan & Campbell for plaintiff.
V. E. Phelps, L. J. Poisson and Robert W. Davis for defendant.

ADAMS, J. The plaintiff admits that the controversy is to be determined under the provisions of the Federal Employers' Liability Act, and that the two decisive questions are involved in the first and third issues. The defendant in apt time moved to dismiss the action as in case of nonsuit on the grounds that the plaintiff had not shown any act of negligence on the part of the defendant, and, if he had shown negligence, that the plaintiff had assumed the risk of personal injury and was barred of his alleged right to recover damages. The motion was denied. We are therefore first concerned with the question whether the evidence when construed most favorably for the plaintiff is sufficient to make a case of actionable negligence entitling the plaintiff to an affirmative answer to the first issue.

Negligence, which is not defined by the Employers' Liability Act, must be determined by applying the principles of the common law. *Brundege v. R. R.*, 154 N. E. (Ill.), 433. In general terms it signifies a failure to exercise that degree of care which the circumstances demand and which prudent men ordinarily observe. *R. R. v. Richardson*, 91 U. S., 454, 23 Law Ed., 356. In the case of a passenger the fact of an accident usually carries with it a presumption of negligence; but a different rule imposes upon an employee the burden of showing as an affirmative fact that the employer has been negligent. *Patton v. Railway Co.,* 179 U. S., 655, 45 Law Ed., 361. And in determining an issue of negligence under the Federal Act the decisions of the Supreme Court of the United States must control. That Court has held that submission to the jury of contested issues of fact is not required in the Federal courts if there is only a scintilla of evidence; that it is the duty of the judge to direct the verdict when the testimony and all inferences which the jury could justifiably draw therefrom would be insufficient to support a verdict for the other party; and, further, that this Federal rule must be applied by State courts in cases arising under the act. *R. R. v. Hughes,* .... U. S., ..., decided 18 February, 1929.

Section 1 of the Act of 1908 (45 U. S. Code, Annotated) provides that every common carrier by railroad while engaging in interstate commerce shall be liable in damages . . . for injury or death resulting in whole or in part from the negligence of any of its officers, agents, or employees, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

The plaintiff's brief is confined to alleged negligent acts of omission—the defendant's failure to exercise due care to provide for him a reasonably safe place in which to work and reasonably safe tools, appliances and equipment.

"The word 'equipment' as used in a contract or statute relating to railroads has been held to mean the necessary adjuncts to the operation of a railroad, such as cars, locomotives, and other movable property. The term cannot, however, be construed to include everything that is necessary to the operation of the road and is not broad enough to include structures such as machine shops, round-houses, and the like." 22 R. C. L., 902; *Elliott v. Payne,* 239 S. W. (Mo.), 851, 23 A. L. R., 706. In the latter citation it is said that the word "equipment" is applied more to personal and movable property than to fixed or real property; and we think it manifest that the words "tools and appliances," as used in the complaint, were intended to apply to implements or instruments of manual operation. We have found no evidence of the defendant's negligent failure to provide such instrumentalities for the benefit of the plaintiff. There is nothing in the record to show that any tool or appliance was essential to the prosecution of the work in which the plaintiff was engaged, or was approved and in general use by persons doing the same or similar work. The plaintiff made use of a bar to slide the bolster to the end of the cap sills, and immediately after he had worked the bolster from under the stringer he undertook to assist in raising it;

but it was brought up by means of ropes and not by the use of tools. For this part of the work no tool or appliance was requested; apparently none was needed. These facts, it would seem, leave as the only basis of the cause of action the defendant's alleged negligent failure to provide a reasonably safe place for the plaintiff while carrying on his work.

Upon this cause of action the plaintiff must fail. Of course the defendant owed him the nondelegable duty to exercise due care to provide a reasonably safe place in which to work; but the question is whether the evidence tends to show a breach of this duty. The answer, we think, may be found in the plaintiff's own testimony. He was 19 years of age when injured. He had worked on the defendant's trestle force in 1926; again for two months immediately before he was injured; also at some other time in the defendant's carpenter department. In his testimony he said: "I was replacing a bolster, which is a piece of timber which goes between the stringers and cap sills. The cap sills sit upon the piling that is driven down. I think the trestle was about eighteen or twenty feet high. The bolster sits on the cap sills and the stringers are on top of the bolster and the cross-ties on the stringers. There is a guard rail at the end of the cross-ties. The bolsters are twenty-one inches wide and about six or seven inches thick. They consist of three pieces of 7 x 14 timbers bolted together. They are about seven feet in length. On this day we were repairing bolsters and trestles. In order to do the work we had to take out the bolsters. At the time I was hurt we had taken the bolster out from under the stringer. It had to be taken out in order to repair it. They placed two ropes, one under each end of the bolster and around it on the outside of the guard rail and brought it up. The rope was looped around the bolster, one at each end. The men who were pulling on it were on top of the trestle. In pulling it up it got fastened under the cross-ties and I was instructed to help them. I was told to get it out from under the track. I went there like I was told, and I braced myself and reached over and got overbalanced. I braced myself by bearing against the guard rail and bracing; the guard rail was round and I lost my balance and slipped and had no way to catch my hold. I was trying to get the bolster loose so they could bring it over the track when I fell. I struck on a cross piece with my back, which was about nine feet from the top of the trestle and slipped off and fell to the ground. . . . On top of the stringers were laid the cross-ties and at the end of the cross-ties on each end were the guard rails running parallel with the railroad lines in the middle of the trestle. The cap sills extended beyond the guard rail about twenty inches. The guard rail was about six inches above the cross-ties. In taking the bolster from under the trestle you jack up the stringer, carrying with it the cross-ties, guard rail and railroad rail, and this had been jacked up at the time to clear the bolsters. I slid the bolster to the end of the cap sills using a piece of bar, working it out from under the stringer. The ropes were fastened to the rail and passed over the guard rail and cross-ties and around under the bolster, and the loose ends were brought up. One rope on each end of the bolster. The men were pulling the bolster up on top of the track. As they pulled on the ropes the bolster rolled up on the trestle against the guard rail. I went there to get it loose from the cross-ties. The bolster was right underneath the cross-ties. The cross-ties extend about an inch beyond the guard rail usually. I do not know whether these extended or not. It was about twenty-two inches from the cap sill to the top of the trestle. I went there to help raise the bolster and slipped and fell over. It had been raining practically all that day."

J. H. Potter testified that the plaintiff had told him that he put his foot against the stringer which had a "rounding edge and everything being slick, he got overbalanced and there was nothing to protect him and nothing to do but fall."

That the stringer had a "rounding edge" can hardly be regarded as evidence of a negligent omission of the defendant's duty. The principle that an employer is required in the exercise of due care to provide for his employee a reasonably safe place in which to work does not usually apply to "ordinary everyday conditions requiring no special care, preparation, or prevision, where the defects are readily observable, and there is no reason to suppose that the injury complained of will result." *Bunn v. R. R.*, 169 N. C., 648; *Smith v. Ritch*, 196 N. C., 72. Indeed, under the Federal Act, except as provided in section 4, the employee assumes, not only the ordinary risks of his employment, but such as are extraordinary or due to the negligence of his employer, when they are obvious or fully known and appreciated. *R. R. v. Koske*, ... U. S., ..., decided 18 February, 1929.

All the defendant's evidence tends to show that its work was done in the customary method; and while, as the plaintiff insists, the test of responsibility is whether the employer has exercised due care, still if such methods of performing the work are adopted as are generally used by prudently conducted roads engaged in the same business and surrounded by like circumstances, the employer as a rule will not be liable. *Railway Co. v. Barrett*, 166 U. S., 617, 41 Law Ed., 1136.

The defendant insists that the plaintiff's injury resulted from chance or casualty, or from his assumption of risk, and that in either event the defendant cannot be held to respond in damages. We concur to the extent of saying that the evidence is not sufficient to warrant the verdict which was returned or the judgment which was signed and entered of record. The motion for nonsuit should have been granted.

Judgment reversed.

MAUDE MEHAFFEY, ADMINISTRATRIX, v. APPALACHIAN CONSTRUCTION COMPANY.

(Filed 3 April, 1929.)

Master and Servant C b—Employer liable for failure to furnish reasonably safe transportation when he assumes this service—Independent contractors.

An employer of labor who assumes to transport his employees to and from work is held in the exercise of ordinary care to do so with reasonable safety, and is liable in damages to one of them injured by the negligent acts of an agent or authorized representative he has selected for that purpose when such injury is thereby proximately caused, irrespective of whether the agency thus selected and acting is an independent or subcontractor, or has contracted to do so for compensation or otherwise.

CIVIL ACTION, before *Deal, J.*, at February Term, 1928, of HAYWOOD.

The evidence tended to show that Kenneth Mehaffey, a boy about fourteen years of age, was employed by the defendant to sprinkle concrete in Hazelwood, with the understanding that he was not to be moved to any point outside thereof. The work in Hazelwood was finished about dinner time on 26 May. The defendant had a contract for the construction of a highway and was working upon highway No. 10 at Balsam, a distance of from four to eight miles from Hazelwood. On the afternoon of 26 May the mixer foreman of the defendant directed one Leatherwood, a truck driver for the defendant, to take Kenneth Mehaffey to Balsam in order to sprinkle concrete at that point. That afternoon at quitting time Stevenson, who was superintendent or foreman in charge of the work, remarked in the presence of plaintiff's intestate and other employees that Leatherwood should wait and take the finishers in and that the other employees could "catch Justice's other cement trucks." Kenneth Mehaffey, together with some other employees, climbed on Justice's truck and started to Hazelwood where he lived. The truck of Justice was running close behind another cement truck operated by a man named Freeman. Freeman intended to turn into a side road on his left and "pulled to the right to make his swing around into the road, and Mr. Justice went to come around Mr. Freeman on the left-hand side of the road, and when Mr. Freeman came across the road to the left Mr. Justice threw his truck back to the right and that threw the little boy off into the center of the highway. . . . The little boy was standing up with his back against the cab with his hand on the side. . . . When he made a quick turn to the right the truck went off on the other side of the road. . . . The little boy fell off on the left-hand side of the road, in the center. Before Mr. Freeman went to make his turn into the road to the left he threw out his sign—threw his hand up that way— . . . put his hand out on the right-hand side of the truck."

Kenneth Mehaffey was picked up and hurried to the hospital, but died on the way.

There was evidence tending to show that after the road force was moved to Balsam that employees of defendant frequently rode on the cement truck of Justice morning and night to and from Hazelwood and Balsam; and further, that Mr. Stevenson had said he would furnish transportation for what men could ride on the company's trucks, but ordinarily they were out of commission and could not carry the men, and he said, "You can go on the cement trucks." The evidence further tended to show that Mr. Stevenson had requested Mr. Justice to haul the men backward and forth. He just told him "the company's trucks could not haul all the men, and he wanted to transport men back and forth from Hazelwood to the works. Mr. Justice told him he would." Justice and Freeman were employed by the Lee Transportation Company to run trucks and haul sand and gravel to the works. The Lee Transportation Company was an independent contractor and had no relationship with the defendant except to carry out the terms of its subcontract in furnishing certain material for the work. There is no evidence that the defendant paid Justice or Freeman for any services connected with the transportation of employees.

The evidence for the defendant was strong and contradicted the evidence offered by the plaintiff.

The issues and answers of the jury thereto were as follows:

1. Did the defendant contract with the father of the deceased to work deceased only in the town of Hazelwood, and not on highway No. 10, outside of Hazelwood, as alleged in the complaint? Answer: Yes.

2. Did the defendant contract or undertake, expressly or by implication, to transport plaintiff's intestate to and from his work outside of the town of Hazelwood? Answer: Yes.

3. Was Decatur Justice in the employ of the defendant at the time of the injury and death of plaintiff's intestate? Answer: Yes.

4. Was Tom Freeman in the employ of the defendant at the time of the injury and death of plaintiff's intestate? Answer: Yes.

5. Was the plaintiff's intestate injured and killed by the negligence of the defendant, Appalachian Construction Company, as alleged in the complaint? Answer: Yes.

6. Did the plaintiff's intestate, by his own negligence, contribute to his injury and death, as alleged in the answer? Answer: No.

7. What damage, if any, is the plaintiff entitled to recover? Answer: $7,000.

From judgment upon the verdict the defendant appealed.

Morgan & Ward and Alley & Alley for plaintiff.
A. Hall Johnston for defendant.

BROGDEN, J. What duty is imposed by law upon an employer who undertakes to transport workmen?

This case was considered by the Court upon a former appeal, and is reported in 194 N. C., 717, 140 S. E., 716. A new trial was awarded upon the ground that the jury had not been properly instructed upon the question as to whether the defendant contracted to provide transportation for the deceased or whether he was riding upon the truck at the invitation or by the license of the owner or the driver.

It is to be observed that the issues in the case at bar are much more comprehensive than those appearing in the former opinion.

Certain principles relating to the question of law involved, have been discussed and enunciated by this Court. In *Haynie v. Power Co.,* 157 N. C., 503, 76 S. E., 198, the Court declared: "We do not mean to hold that the defendants became insurers of the intestate's life, but if the agreement be as testified to by plaintiff, it was the duty of defendants to use due diligence and care to keep him away from the machinery and at the work he was hired to perform or else to return him to his father." *Ensley v. Lumber Co.,* 165 N. C., 687, 81 S. E., 1010; *Satchell v. McNair,* 189 N. C., 472, 127 S. E., 417.

Again, in *Tanner v. Lumber Co.,* 140 N. C., 475, 53 S. E., 287, the Court said: "The rigorous rule that once obtained has been greatly modified. The true rule now is more humane and holds the master is liable for negligence in respect to such acts and duties as he is required, or assumed to perform, without regard to the rank or title of the agent entrusted with their performance. As to such acts the agent occupies the place of the master and he is liable for the manner in which they are performed." To the same effect is *Williams v. R. R.,* 190 N. C., 366, 129 S. E., 816, in which the principle of law applicable is thus expressed: "Where the master undertakes to furnish his laborers transportation to and from their work, it is his duty, in the exercise of ordinary care, to see to it that such transportation is rendered as reasonably safe as the character of it will permit."

The clear meaning of these decisions is that an employer of labor, who either contracts to furnish transportation or assumes the task and responsibility of so doing, is required by law to exercise ordinary care in discharging such obligation, and is therefore liable for the negligence of the person who undertakes for him and by his direction to transport employees. This is true whether the person actually transporting workmen be called servant, agent or independent contractor.

The jury has found from proper evidence that the defendant had assumed the obligation of transporting workmen from Balsam to Hazelwood, and that Justice was the person employed by the defendant for returning Kenneth Mehaffey and others to their homes; and further, that the death of plaintiff's intestate was proximately caused by the negligence of the defendant.

There is some contention that there is no evidence that Freeman was employed by the defendant to transport laborers, but the recovery can be sustained irrespective of either the employment or negligence of Freeman, because there is positive evidence that the truck driven by Justice was especially selected by Stevenson, superintendent of the defendant, for returning plaintiff's intestate to his home. Moreover, there is sufficient evidence of the negligence of Justice. A close scrutiny of the record discloses no error of law warranting a new trial, and the judgment is affirmed.

No error.

STATE v. ED WESTON.

(Filed 10 April, 1929.)

1. **Criminal Law G p—Foot tracks are competent evidence of identity.**

   Where the foot tracks of the defendant on trial for the unlawful possession of intoxicating liquor are relevant to the inquiry, the similarity between them and the shape of the defendant's identified shoes is competent to be testified to by the witnesses, being a "shorthand statement of the fact" of identification resulting from a mental conclusion made by them at the time.

2. **Appeal and Error E b—Matters not set out in record deemed without error.**

   Where there is exception on appeal to the charge of the court, the charge will be presumed to be correct where it is not set out in case on appeal.

3. **Intoxicating Liquor B a—Constructive possession of intoxicating liquor is sufficient—Circumstantial Evidence.**

   Possession of intoxicating liquor necessary to convict of the offense under our prohibition law may be constructive and shown by circumstantial evidence, which in this case is held sufficient to sustain the verdict of the jury for conviction.

4. **Criminal Law G n—Sufficiency of circumstantial evidence.**

   Where the evidence as to the possession of intoxicating liquor is capable of two inferences, one sufficient to convict and one to acquit the defendant, the case should be submitted to the jury, and on the defendant's appeal from an adverse verdict, the question of the sufficiency of the evidence to be submitted to the jury will be determined in the Supreme Court.

APPEAL by defendant from *Cranmer, J.,* at October Term, 1928, of BRUNSWICK. No error.

This is a criminal action in which the defendant is charged with the unlawful possession of intoxicating liquor, in Brunswick County, on or about 11 May, 1928. There was a verdict of guilty.

From judgment on the verdict, defendant appealed to the Supreme Court.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

Newman & Sinclair for defendant.

CONNOR, J. Defendant was convicted in the recorder's court of Brunswick County upon a warrant charging him with the unlawful possession of intoxicating liquor. He appealed from the judgment on said conviction to the Superior Court of said county. From the judgment on the verdict at the trial in the Superior Court, he has appealed to this Court. He relies here chiefly upon his assignment of error based on his exception to the refusal of the trial court to allow his motion for judgment of nonsuit, aptly made under C. S., 4643.

Assignments of error based on exceptions to the rulings of the court with respect to the evidence have been duly considered. These assignments present no questions which require discussion; they cannot be sustained. No authorities are cited in defendant's brief in support of his exceptions. The testimony of witnesses that the tracks on and about defendant's premises were similar to the tracks on the path, and at the stills, was competent. The similarity of the tracks was a fact, observable by the witnesses; their testimony was the result of a mental conclusion made by them at the time and is a "shorthand" statement of such conclusion. *S. v. Holland,* 193 N. C., 713, 138 S. E., 8; *Moore v. Ins. Co.,* 192 N. C., 580, 135 S. E., 456; *S. v. Walton,* 186 N. C., 485, 119 S. E., 886; *S. v. Leak,* 156 N. C., 643, 72 S. E., 567. The witnesses were, of course, subject to cross-examination for the purpose of testing the probative value of their testimony.

There is no exception in the record to the charge of the court to the jury. The charge is not included in the case on appeal. It is, therefore, presumed that the charge is free from error, and that the jury was properly instructed as to the law arising upon the evidence, as required by statute. C. S., 564. *S. v. Sigmon,* 190 N. C., 684, 130 S. E., 854, and cases therein cited.

The only question presented for decision, which seems to require discussion, is whether the evidence was sufficient, as a matter of law, for submission to the jury, as tending to show, as a matter of fact, that the defendant had intoxicating liquor in his possession, actual or constructive, in Brunswick County, on or about 11 May, 1928, in violation of the statute. Possession, either actual or constructive, is sufficient. *S. v. Lee,* 164 N. C., 533, 80 S. E., 405.

There was evidence tending to show that on the morning of 11 May, 1928, certain officers went upon defendant's premises in Brunswick County, to search for stolen property; that no stolen property was found on said premises; that while making said search, the officers found in the smokehouse on said premises, a pair of boots; that these boots were wet, and had "mash" on them, indicating that they had been recently used by some person at a whiskey still; and that defendant owned these boots, and frequently used them, while walking about his premises, and about the neighborhood.

There was evidence, also, tending to show that there were tracks, made by some person wearing boots, on and about defendant's premises, and on a path leading from the road, which runs by said premises, through the woods, to a creek—a distance of about a quarter of a mile; that just across the creek, on the side opposite defendant's premises, there were two whiskey stills; and that about these stills there were boot tracks, indicating by their appearance that they had been recently made. All the boot tracks—those on defendant's premises, those on the path, and those at the stills, were fresh. Witnesses testified that in their opinion, all these tracks were made by the same person wearing the boots found in the smokehouse on defendant's premises, and owned by him.

The evidence tended to show, further, that at a distance of about thirty or thirty-five yards from defendant's premises, on or near the path along which there were boot tracks, leading from said premises, the officers found two hot-water bottles; these bottles were in a hole, covered up by fresh dirt and by grass. There was an odor of whiskey about these bottles; there was no whiskey, however, in them, when they were found by the officers. Fifteen feet from the hot-water bottles, a witness found a half-gallon jug. Following the tracks on the path to a landing on the creek, a witness found, near the landing, sacks containing half-gallon jars, filled with whiskey. The jars contained more than seven gallons of whiskey. Just across the creek, from the landing, were two whiskey stills. In addition to the fresh boot tracks found at the still and along the path leading from the stills to defendant's premises, there were older tracks. Both the old and the fresh tracks appeared to have been made by the same person.

Defendant was not at his home when the officers first arrived there; he came up, however, within about thirty minutes, after they arrived. He came from a direction opposite the path leading to the whiskey still. He testified that he had been to Wilmington to see his son who was sick and in a hospital; that he had not been on the path where the tracks were found by the officers, within two or three days; that he had not been to the landing on the creek, where the whiskey was found, within a month. Defendant denied that the whiskey found by the officers was or had ever been in his possession. He testified that he did not own a drop of the whiskey. There was evidence tending to show that defendant's character is bad, especially for handling and dealing in intoxicating liquor. There was no evidence to the contrary.

There was no direct evidence that the fresh tracks on defendant's premises, or on the path leading from his premises to the landing at the creek, or at the stills, across the creek, were made by defendant; that these tracks were made by defendant, while wearing the boots found in his smokehouse, shortly before they were seen by the witnesses is, however, a reasonable inference from the facts and circumstances which the jury might well find from the evidence and is altogether consistent with these facts and circumstances; whether or not such inference should be drawn, as a matter of fact, from all the evidence, was for the jury. It cannot be held, as a matter of law, that the inference could not reasonably be drawn by the jury for that such inference was not altogether consistent with the facts and circumstances established by the evidence.

There was no direct evidence that defendant, at any time, had had the whiskey found by the officers at or near the landing on the creek, in his possession, either actual or constructive; if, however, the jury should find from all the evidence that the tracks on the path leading from defendant's premises to the landing, were made by defendant, shortly before the whiskey was found, the further fact that the whiskey had been, shortly before it was found, in the actual possession or when it was found, was in the constructive possession of defendant, was an inference which could be reasonably drawn from all the evidence by the jury. It cannot be held, as a matter of law, that such inference was unreasonable, and merely a conjecture, or that the evidence raised no more than a strong suspicion of the existence of the essential fact involved in the issue to be determined by the jury.

It is admittedly difficult to formulate a rule, or to state the principle upon which a rule may be formulated, for the decision of the question presented by this appeal. Where there is no direct evidence as to the essential fact involved in the issue to be passed upon by the jury, such fact may nevertheless be inferred by the jury from facts and circumstances which they may find from the evidence. Where such inference may be reasonably drawn by the jury, and is altogether consistent with the facts and circumstances which the jury may find from the evidence, the evidence should be submitted to them; where the inference cannot be thus reasonably drawn, it should be withdrawn from the jury. The question as to whether the inference may be reasonably drawn by the jury from all the evidence, must in the first instance be decided by the trial court, as a matter of law; from its decision, adverse to the defendant in a criminal action, defendant may appeal to this Court. On such appeal, it becomes the duty of this Court, in the exercise of its appellate jurisdiction, to review the decision, and to determine whether or not, there was error as a matter of law or legal inference in such decision.

On an appeal to this Court, from a judgment in a criminal action on a verdict of guilty, where the decision of the trial court, resulting in the submission of the evidence to the jury, subject to an exception by the defendant, is assigned as error, as said by *Brogden, J.,* in *S. v. Montague,* 195 N. C., 20, "the whole matter resolves itself into an interpretation of the record. As to this, different minds will make different conclusions." There is, therefore, always room for much, and frequently for wide difference of opinion as to whether the evidence in the case, where merely circumstantial, was sufficient, as a matter of law, to be submitted to the jury. But as said by *Adams, J.,* in his dissenting opinion in the *Montague case,* "Not only is circumstantial evidence an accepted instrumentality in the ascertainment of truth, it is essential to the administration of justice." In *S. v. Sigmon,* 190 N. C., 684, 130 S. E., 854, we held that the evidence, although circumstantial, was sufficient, and that there was no error in the refusal of the court to sustain defendant's motion for judgment as of nonsuit. In *S. v. Swinson,* 196 N. C., 100, we were of the opinion that the evidence was not sufficient, as a matter of law, for submission to the jury; we, therefore, reversed the judgment on a verdict which was supported only by circumstantial evidence. In that case, it is said that when the essential fact in controversy in the trial of a criminal action can be established only by an inference from other facts, there must be evidence tending to establish these facts. Evidence which leaves the facts from which the inference as to the essential fact must be made a matter of conjecture and speculation, is not sufficient, and should not be submitted to the jury. *S. v. Prince,* 182 N. C., 788, 108 S. E., 330, and *S. v. Vinson,* 63 N. C., 335. However, where there is sufficient evidence from which the jury may find the facts and circumstances, from which the inference as to the essential fact must be made, and the inference is reasonable, and consistent with such facts and circumstances, and the essential fact is not left to mere conjecture and speculation, the evidence should be submitted to the jury. A full and lucid statement of the law, with respect to this matter, may be found in the opinion of *Brown,* *J.*, in *S. v. Plyler,* 153 N. C., 630, 69 S. E., 269, cited and approved by *Clarkson, J.*, in *S. v. Lawrence,* 196 N. C., 562.

In the instant case, although the evidence is wholly circumstantial, we are of the opinion that the essential facts, involved in the issue to be determined by the jury, could be reasonably inferred from the facts which the jury could well find from the evidence. Therefore, we find no error in the refusal of the court to allow defendant's motion for judgment as of nonsuit, under C. S., 4643. See *S. v. Meyers,* 190 N. C., 239, 129 S. E., 606. The judgment is affirmed.

No error.

CHAMPION SHOE MACHINERY CO. v. G. B. SELLERS.

(Filed 10 April, 1929.)

1. **Statutes B a—General rules for construction of statutes—Legislative Intent.**

   A statute will be interpreted in accordance with the meaning and intent of the Legislature as gathered from its terms, and where a technical interpretation will destroy the manifest spirit, the latter will prevail.

2. **Same—Title to Acts.**

   Where the meaning of a statute is at all in doubt, reference may be had to the title and context as legislative declarations of its purpose.

3. **Warehousemen A a—Statutory warehouseman's lien applies only to those operating warehouse for compensation.**

   Under the provisions of C. S., 2459, construed in *para materia* with sections 8107, 2459, 2460, 4925(a), *et seq.*, 5118, the persons, firms or corporations entitled to the possession and lien on property stored in warehouses applies to such as operate warehouses as a business for compensation, and not to an isolated instance in which goods or chattels are left in a store or building of the claimant.

APPEAL by defendant from *Sinclair, J.*, at December Term, 1928, of ROBESON. No error.

On 6 November, 1925, the plaintiff entered into a written agreement with B. F. Gleaves, of Maxton, by the terms of which the plaintiff for value delivered to Gleaves one Champion F-89 Finisher and one Peerless Stitcher No. 16121, and retained title as security for payment of the purchase price. The agreement was duly registered on 5 December, 1925. Gleaves put the machines in a building which he had rented from the defendant as a shoe shop and a store, and went out of business 1 January, 1927. He left the machines in the defendant's building. The defendant thereafter wrote the plaintiff two letters, in one of which he said he must have a reasonable rent for the space occupied by the machines, and in the other that he was entitled to storage. There was testimony that the defendant told a representative of the plaintiff that he had to have storage.

The plaintiff brought suit for possession of the machines and these issues were submitted to the jury:

1. Is the plaintiff the owner and entitled to the possession of the machinery described in the complaint?

2. Has the defendant a lien upon the property described in the complaint?

3. In what sum, if any, is the plaintiff indebted to the defendant for storage on the machinery referred to in the pleadings?

The judge instructed the jury, if they believed the record evidence and found the facts to be as testified to by all the witnesses, to answer all the issues in favor of the plaintiff. The plaintiff recovered a judgment and the defendant excepted and appealed.

J. E. Carpenter for plaintiff.
Johnson, Johnson & Floyd for defendant.

ADAMS, J. In his brief the appellant admits that the only question for decision is whether an individual is entitled to a lien for the storage of personal property by virtue of C. S., 2459, under the facts above stated. The section is in these words: "Every person, firm or corporation who furnishes storage room for furniture, tobacco, goods, wares or merchandise and makes a charge for storing the same, has the right to retain possession of and a lien upon all furniture, tobacco, goods, wares or merchandise until such storage charges are paid."

The appellant's position cannot be maintained unless the statute is given a strictly literal interpretation and its spirit and purpose are disregarded. It has been said that the letter of the law is its body; the spirit, its soul; and the construction of the former should never be so rigid and technical as to destroy the latter. *Kleybolte v. Timber Co.,* 151 N. C., 635, 638; *Kearney v. Vann,* 154 N. C., 311. According to the rule that the object of all interpretation and construction of statutes is to ascertain the meaning and intention of the Legislature, a statute should receive a strict or liberal construction as the one or the other will accomplish the legislative intent. Black's Int. of Laws, 35; *S. v. Barco,* 150 N. C., 792; *Abernethy v. Board,* 169 N. C., 631; *S. v. Earnhardt,* 170 N. C., 725. When the meaning of a statute is at all in doubt reference may be had to the title and the context as legislative declarations of the purpose of the act. *S. v. Woolard,* 119 N. C., 779. The title of the original act (Public Laws 1913, ch. 192, amended by

Public Laws 1915, ch. 190) does not refer in express terms to warehouses as places of storage; but all provisions, chapters, subdivisions, and sections contained in the Consolidated Statutes were enacted into a composite body of law on 10 March, 1919, and as such became effective on the first day of the following August. C. S., 8107. When they went into effect under the act of 1919 (ch. 238, sec. 8) sections 2459 and 2460 composed the whole of chapter 49, article 4, which was entitled by the General Assembly "Warehouse Storage Liens." This title is a legislative declaration of the tenor of the sections; they apply only when the enumerated articles are delivered to and accepted by a person, firm, or corporation engaged in the business of storage and safe-keeping for compensation. Not only the title of the article but the wording of the sections is in support of this position. The phrase "every person, firm, or corporation who furnishes storage room" evidently does not contemplate a single act as in the case before us, but such continuous acts as occupy the time and attention of men for the purpose of profit. A warehouse system to aid in the marketing of leaf tobacco is authorized by section 5124 *et seq.*, and in the marketing of cotton by 3 C. S., 4925(a) *et seq.* Chapter 91, article 5, authorized the operation of public warehouses. Section 5118 provides: "Any person or any corporation organized under the laws of this State and whose charter authorizes it to engage in the business of a warehouseman, may become a public warehouseman and authorized to keep and maintain public warehouses for the storage of cotton, goods, wares, and other merchandise as hereinafter prescribed and upon giving the bond hereinafter required."

The words "goods, wares, and merchandise" are used in section 2459 and in section 5118. The first provides for the storage of furniture and tobacco; the other for the storage also of cotton. The chapter on "Warehouse Receipts" defines "goods" as "chattels or merchandise in storage, or which has been or is about to be stored," and "warehouseman" as a person lawfully engaged in the business of storing goods for profit. It gives the warehouseman a lien on goods deposited or on the proceeds thereof in his hands, for all lawful charges for the storage and preservation of the goods. C. S., 4067. It was probably in consideration of public service or the performance of a statutory duty, such as the payment of a privilege tax or the execution of an official bond, that the Legislature granted to warehousemen a lien on goods in storage. Construing the several statutes in *pari materia* we are convinced that section 2459 applies only to those engaged in the business of accepting goods for storage and making a charge therefor at the time they are received.

No error.

BOARD OF EDUCATION OF WAKE COUNTY AND JOHN C. LOCKHART, SUPERINTENDENT OF PUBLIC INSTRUCTION OF WAKE COUNTY, v. DELIA BANKS PEGRAM AND HUSBAND, MONROE PEGRAM.

(Filed 10 April, 1929.)

1. **Schools and School Districts B a—Board of Education has power to condemn additional land to enlarge school district.**

Construing C. S., 5469, in connection with the former statutes giving the county board of education the power to condemn lands necessary for public school purposes within the limitation of ten acres, it is *Held*, the fact that one of these schools had already acquired a less amount of land did not preclude the county board of education from acquiring by another proceeding sufficient lands to meet the enlarged and necessary requirements of the school for additional lands within the limitation imposed by statute.

2. **Same—Construction of Statutes.**

Where the county board of education has the power to condemn land under former statutes the question of whether a later statute is declaratory of the existing law or whether it confers additional power upon the board becomes academic.

CIVIL ACTION, before *Harris, J.*, at November Term, 1928, of WAKE.

The facts found by the clerk were substantially as follows: The Willow Springs School in Wake County acquired a school site containing two acres, in 1905. In 1927 the school district was greatly enlarged and was thereafter known as the Willow Springs Consolidated School, and "it is necessary that the site be enlarged by reason of the great increase in number of children attending the consolidated school." The defendants owned approximately seven acres of land adjacent to said school, and on 4 January, 1928, the board of education undertook pursuant to law to condemn two and a half acres of the land of the defendants as a school site, which would give the said school a site containing four and a half acres, more or less.

Upon the foregoing facts the clerk was of the opinion that the plaintiff had no power to acquire additional land by virtue of the provision of chapter 136, section 61, Public Laws 1923, which is embodied in C. S., 5469.

Upon appeal from the clerk to the judge of the Superior Court the ruling of the clerk was affirmed, and the plaintiff appealed.

J. C. Little for plaintiff.
Briggs & West for defendants.

BROGDEN, J. The defendants contend that the county board of education, having selected a site containing two acres, was without power to condemn additional land under the law as it existed at the time of instituting the suit. This contention is based upon the theory that C. S., 5469 does not authorize a county board of education to exercise the power of condemnation but once; and thus, when a site has been acquired, the power to condemn is exhausted, irrespective of the growth of the school and the imperative necessity for an enlarged site.

Apparently, the power to condemn was first bestowed upon county boards of education by section 31, chapter 4, Public Laws 1901. This statute permitted schools to condemn not more than one acre for a site; provided, however, that improved land was not to be taken unless absolutely necessary. Section 13, chapter 435, Public Laws 1903, substituted two acres for one acre. Section 8, chapter 533, Public Laws 1905, amended the act of 1901, by permitting additional land to be secured for a school site provided the original site plus the additional land acquired did not exceed two acres. Section 1-b, chapter 149, Public Laws 1913, provided that additional land could be acquired and added to the original site provided the total amount of land did not exceed three acres. Section 61, chapter 136, Public Laws 1923, now incorporated as a part of C. S., 5469, provided for a school site of "not more than ten acres." It appears, therefore, that since 1901 boards of education have been authorized to condemn land for suitable school sites. Section 1-b, chapter 149, Public Laws 1913, incorporated in 2 C. S., 5416, undertook to provide for a minimum and a maximum school site. In other words, the board of education was authorized to condemn "not more than two acres," but it could thereafter acquire an additional acre, making a maximum of three acres. However, 5469 prescribes no minimum at all, but fixes the maximum school site at "not more than ten acres." Evidently, it was contemplated that a school site was an elastic quantity, varying as the expansion and needs of the school systems might require. This idea is embodied in the term "suitable site" appearing in the statute. Where the power of condemnation is expressly conferred and a maximum of land prescribed, we can see no just or logical reason why the power would be exhausted by one exercise thereof unless of course the maximum quantity of land had been acquired.

One phase of the question now presented, was considered by this Court in *Board of Education v. Forrest,* 190 N. C., 753, 130 S. E., 621. The decision was based upon the fact that the board of education had originally selected the land in dispute as a part of the school site and had purchased a part of the site and erected a building thereon, and being unable to secure the other portion so selected, proceeded to condemn the same, and therefore the purchase of one portion and the condemnation of the other were merely separate stages in the same transaction. Hence the question of law presented in the present appeal was neither discussed nor decided in the *Forrest case.*

However, the General Assembly amended C. S., 5469, in March, 1929, by providing that "where sites have already been acquired and additional adjacent lands are necessary, such additional lands may be acquired as in this section provided, which lands, together with the old site, shall not exceed ten acres." Whether the act of 1929 was merely declaratory of the law then existing, or whether it was intended to confer an additional power of condemnation is now wholly immaterial and academic.

Reversed.

F. C. DARDEN v. J. H. COWARD ET AL.

(Filed 10 April, 1929.)

Banks and Banking H a—Statutory liability does not lie where stock was sold before insolvency but not transferred through neglect of transfer agent.

Where a former owner of shares of stock in a bank has sold, and, on the certificate, assigned his shares to a purchaser, and sometime thereafter the bank has become insolvent and the liquidating agent of the bank appointed by the Corporation Commission has assessed the shares against the former owner whose name still appears as such owner on the books of the bank owing to the neglect of the transfer agent to reissue the shares to the purchaser: *Held,* the ostensible owner should be relieved of the assessment so made against him.

APPEAL by defendants from *Nunn, J.,* at September Term, 1928, of PITT.

Controversy without action submitted on an agreed statement of facts:

1. On 30 November, 1927, W. H. Woolard was appointed liquidating agent of the Bank of Ayden by the Corporation Commission of North Carolina agreeably to the provisions of chapter 113, Public Laws, 1927.

2. Thereafter, in accordance with the terms of the statute, assessments were levied and filed in the office of the Superior Court of Pitt County against the stockholders of said bank, including an assessment of $500.00 against the plaintiff, F. C. Darden, whose name appeared on the books of the bank as the owner of 10 shares of its capital stock at the time of its insolvency.

3. The plaintiff sold his stock in the Bank of Ayden during the month of November, 1926, assigned the certificate in blank, and the same was

owned by J. D. McGlohon, cashier and stock-transfer agent of said bank at the time of its failure, though no transfer had been made on the books of the bank.

4. The said J. D. McGlohon admits that he was, and had been for nearly a year prior to the closing of the bank, the owner of the 10 shares of stock, originally issued to the plaintiff, and that the certificate should have been transferred to him on the books of the bank and canceled as against the plaintiff.

5. The parties agree that "the sole question presented here is whether the said judgment against F. C. Darden in the sum of $500.00 should not have been entered against the said J. D. McGlohon instead, and that the judgment against F. C. Darden should not be vacated and set aside for the reason that F. C. Darden was not the true owner of the stock and that said judgment filed was irregularly obtained and void."

From a judgment declaring the assessment to be null and void as against the plaintiff, and ordering that the same be vacated and set aside, the defendants appeal, assigning error.

F. C. Harding for plaintiff.
Blount & James for defendants.

STACY, C. J. The plaintiff sold his 10 shares of stock in the Bank of Ayden long before its insolvency, and the certificate, duly endorsed in blank, was purchased by J. D. McGlohon, cashier and transfer agent of said bank. It is conceded that the failure to transfer the stock on the books of the bank was due to the neglect of the cashier and transfer agent, and not to any fault of the plaintiff. We concur in the judgment of the trial court that, under the facts agreed, the plaintiff is entitled to be relieved of the assessment levied against him as an ostensible stockholder in the Bank of Ayden at the time of its failure. The case of *Whitney v. Butler,* 118 U. S., 655, 30 L. Ed., 266, is a direct authority for the position, while *Trust Co. v. Jenkins,* 193 N. C., 761, 138 S. E., 139, is distinguishable, in that, in the *Jenkins case* the certificate of stock was not surrendered to the bank for transfer on its books. See, also, *Havens v. Bank,* 132 N. C., 214.

No point is made of the fact that, under chapter 113, Public Laws 1927, the proper method of procedure was for the plaintiff to appeal to the Superior Court from the levy of assessment made by the Corporation Commission. See *Corporation Commission v. Murphey, post,* 42. The correct result has been reached and we are disposed to affirm the judgment.

Affirmed.

MINNIE GENEVA SYKES v. T. J. SYKES AND HIS WIFE, JENNIE SYKES.

(Filed 10 April, 1929.)

1. **Water and Water Courses C a—Upper proprietor does not incur liability for merely accelerating flow of surface waters.**

   The upper proprietor of adjoining lands has the right to accelerate the flow of water upon his own lands without changing its course upon the lands of the lower proprietor without liability for damage to the land of the lower proprietor.

2. **Same—Upper proprietor does not incur liability for filling in ditch of private road on his land.**

   Where the evidence is conflicting as to whether a ditch was on the land of an upper proprietor or on a public roadway the question is for the jury under proper instructions from the court, and upon their finding that the roadway was private the upper proprietor is not liable for damages caused to the land of the lower proprietor by filling the ditch and accelerating the flow of surface water.

APPEAL by plaintiff from *Harris, J.*, at November Term, 1928, of FRANKLIN. No error.

Action to recover damages resulting from injuries to plaintiff's land, caused by the alleged wrongful act of defendants in filling a ditch, and thereby causing water from defendants' land to overflow plaintiff's land.

The answer to the first issue submitted to the jury was determinative of plaintiff's right to recover in this action. The jury found that plaintiff had not been damaged by the negligence of defendants.

From judgment that plaintiff recover nothing of defendants, plaintiff appealed to the Supreme Court.

H. L. Godwin, Yarborough & Yarborough and G. M. Beam for plaintiff.

Cooley & Bone and Ben T. Holden for defendants.

CONNOR, J. Plaintiff and defendants own adjoining tracts of land, situate in Franklin County; both tracts front on the Louisburg and Nashville highway. They are divided by a road, which plaintiff alleges is a public road, known as the Spring Hope road; this allegation is denied by defendants. They contend that this dividing road, is merely a neighborhood path, located partly on their land and partly on plaintiff's land. The ditch which plaintiff contends defendants filled up by plowing over same, is on defendants' side of this road or path. The natural drainage from defendants' land is toward plaintiff's land.

The court instructed the jury as follows: "Before the plaintiff can recover the court charges you that you must find (1) that this was a public road; (2) that there was a ditch or furrow on the east side of that public road, and (3) that that ditch was stopped up by defendants. If you shall find from the evidence that this was not a public road, then the plaintiff cannot recover."

Plaintiff excepted to this instruction and assigns same as error. The evidence as to the character of the road was conflicting. We find no error in the instruction. If the ditch was not on a public road, but on defendants' land, defendants had the right to fill it, and are not liable to plaintiff for damages, if any, caused by filling the ditch. Defendants, as the upper proprietors, had the right to accelerate and even increase the flow of water from their land to the land of plaintiff, the lower proprietor. *Winchester v. Byers,* 196 N. C., 383. There was no evidence that the water was diverted from its natural course. Nor was there evidence tending to show that the ditch had been constructed and maintained by mutual agreement as part of a general system of drainage for both plaintiff's and defendants' lands. If the ditch was on defendants' land, and not on a public road, defendants' act in filling the ditch was not a wrongful act; if damage resulted to plaintiff's land, defendants are not liable.

Other assignments of error have been duly considered; they cannot be sustained. The judgment is affirmed. There is

No error.

L. A. SUTTON AND WIFE v. HINES BROTHERS LUMBER CO.

(Filed 10 April, 1929.)

Deeds and Conveyances F b—Demand of price according to contract for renewal of right to cut timber necessary to declare forfeiture thereof.

In an action to declare a forfeiture in a timber deed for nonpayment of the sum of money stipulated to be paid on demand for a renewal period, the plaintiff must show a proper demand according to the terms of the deed, and upon the failure of evidence in this respect a nonsuit is properly granted.

CIVIL ACTION, before *Nunn, J.,* of DUPLIN.

On 4 August, 1916, J. McR. Grady conveyed certain standing timber upon four tracts of land to the Enterprise Lumber Company. The defendant by proper conveyances has acquired the rights of the grantee in said deed. The grantee and its successors had ten years to cut and remove said timber with the further agreement as follows: "It is agreed that in consideration of the amount as above set forth it shall have as much as five years longer in which to cut and remove said timber by paying to the said J. McR. Grady of the first part the sum of one hundred and twenty dollars per year for each and every additional year that it may consume in cutting and removing the said timber, the said payment to be due each year and payable upon demand of the parties of the first part and upon failure to pay when demanded in any year of such additional time all right of the said party of the second part shall cease, but no forfeiture shall be made unless upon demand and refusal to pay."

On 2 December, 1921, Grady conveyed a part of said land, containing about 103 acres to his daughter, the plaintiff in this action. The evidence tended to show that the extension money for the year 1926 was paid to Grady, the grantor, the plaintiff acquiescing in such payment. Grady wrote the defendant on 18 July, 1928, stating that he was due $90.00, and his daughter, the plaintiff, $30, as that was the amount paid in 1926. However, it was admitted that this was an error, because one-fifth of $120.00 would amount to only $24.00. On 4 August, 1927, plaintiffs made demand upon one Nufer for one-fifth of the extension money. It does not appear in the evidence who Nufer was, but it does appear that a man named Hoffler was the agent of the defendant "who attended to these extensions for the company." No demand was ever made by anyone upon Hoffler until Grady wrote a letter demanding $96.00. This amount was promptly paid, and Grady testified that he claimed no forfeiture. On the same day Hoffler offered to pay plaintiff $24.00, and she declined to accept, contending that a forfeiture had resulted. Whereupon, the sum of $24.00 was paid to the clerk by the defendant for the use of plaintiff.

At the conclusion of plaintiff's evidence, there was judgment of nonsuit, and the plaintiff appealed.

Henry E. Faison, D. M. Jolly and Dawson & Jones for plaintiff.
Rouse & Rouse and Gavin & Boney for defendant.

PER CURIAM. We see no evidence in the record tending to establish the claim of the plaintiff. It appears that the plaintiff and Grady were confused about the division of the extension money through no fault of defendant. While there is evidence of a demand, it does not appear that the demand was made upon the agent having the matter in charge for the defendant. Upon the entire record it appears to us that the trial judge was correct in his ruling.

Affirmed.

J. W. PASCHAL, ADMINISTRATOR, v. JOHN B. PASCHAL.

(Filed 10 April, 1929.)

1. **Executors and Administrators C c—Administrator may not recover from deceased's son money expended in joint enterprise.**

Where a son insures his life for the benefit of his mother in case she survives him, and otherwise to his estate, and some of the premiums on the policy are paid by the insured and some by the mother, upon the prior death of the mother her administrator may not recover from the son the premiums paid by the mother on the theory that they were advancements to him to be accounted for, the arrangement appearing to be their joint enterprise.

2. **Wills F c—Definition of Advancement.**

An advancement is a gift *in præsenti* by a parent to a child for the purpose of advancing the latter in life, and thus for the child to anticipate the inheritance to the extent of the advancement.

APPEAL by plaintiff from *Clement, J.*, at December Term, 1928, of CASWELL.

Proceedings to require John B. Paschal to account to the estate of Martha F. Paschal, deceased, for certain insurance premiums paid by the deceased on an insurance policy carried on the life of John B. Paschal and made payable to Martha F. Paschal, mother of the insured, in case she survived him, otherwise to the estate of the insured. It is alleged by the administrator that the insurance premiums paid by the deceased were advancements to John B. Paschal and as such should be accounted for by him.

From a judgment of nonsuit entered at the close of the evidence, the administrator appeals, assigning error.

Luther M. Carlton and Robert T. Wilson for plaintiff.
E. F. Upchurch and Glidewell, Dunn & Gwyn for defendant.

STACY, C. J. The transaction between the deceased and her son, relative to the insurance policy in question, seems to have been a joint enterprise. Some of the premiums were paid by the parent, some by the child. Both benefited thereby. We think the trial court correctly held that such payments on the part of the mother, under the fact situation disclosed by the record, could not be regarded as gifts or advancements to the son.

An advancement may be defined as a gift *in præsenti* or provision made by a parent on behalf of a child for the purpose of advancing said child in life, and thus to enable him to anticipate his inheritance to the extent of such advancement. C. S., 1654, rule 2; *Lunsford v. Yarbrough,* 189 N. C., 476, 127 S. E., 426; *Nobles v. Davenport,* 183 N. C., 207, 111 S. E., 180; *Thompson v. Smith,* 160 N. C., 256, 75 S. E., 1010; *Kyle v. Conrad,* 25 W. Va., p. 774.

Affirmed.

LAURA COWANS v. NORTH CAROLINA BAPTIST HOSPITALS, INC.

(Filed 10 April, 1929.)

Hospitals B b—Charitable hospital is liable for negligent injury to employees.

A charitable hospital not operated for gain but only for benevolent purposes is liable in damages for a negligent injury inflicted by it on an employee as distinguished from a patient therein. *Green v. Biggs,* 167 N. C., 417; *Hoke v. Glenn,* 167 N. C., 594, cited and distinguished.

APPEAL by defendant from *Moore, J.,* at February Term, 1929, of FORSYTH.

Civil action by plaintiff, servant or employee of defendant, to recover damages for an alleged negligent injury, tried in the Forsyth County Court on the usual issues of negligence, contributory negligence and damages, which resulted in a verdict and judgment for the plaintiff. On appeal to the Superior Court, all exceptions and assignments of error were overruled and the judgment of the county court affirmed.

From the judgment of the Superior Court, the defendant appeals, assigning errors.

Richmond Rucker and John J. Ingle for plaintiff.
A. Wayland Cooke and Fred S. Hutchins for defendant.

STACY, C. J. The chief question presented by the appeal is whether a charitable hospital, operated not for gain, but for benevolent purposes, can be held liable in damages for the negligent injury to a servant or employee. We think so. 5 R. C. L., 378; *McInerny v. St. Luke's Hosp. Asso.* (1913) (Minn.), 46 L. R. A. (N. S.), 548; *Bruce v. Central M. E. Church* (1907), 10 L. R. A. (N. S.), 74, 11 Ann. Cas., 150 (Mich.); *Hewett v. Women's Hosp. Aid Asso.* (1906), 7 L. R. A. (N. S.), 496, 64 Atl., 190 (N. H.); *Hordern v. Salvation Army* (1910), 32 L. R. A. (N. S.), 62, 93 N. E., 626.

Plaintiff was a servant or employee of the defendant, and not a beneficiary of its charity. This distinguishes the case from *Green v.*

Biggs, 167 N. C., 417, 83 S. E., 553, and *Hoke v. Glenn,* 167 N. C., 594, 83 S. E., 807, where it was held that an eleemosynary institution or a charitable hospital was not liable to a patient for the *tort* of its servants or agents, when due care was exercised in the selection or retention of said servants or agents, and no duty was undertaken requiring the exercise of special art or skill. See, also, *Johnson v. Hospital,* 196 N. C., 610.

Affirmed.

CORPORATION COMMISSION OF THE STATE OF NORTH CAROLINA v. D. S. MURPHEY.

(Filed 10 April, 1929.)

1. **Banks and Banking H a—Chapter 113, Public Laws 1927, in regard to liability of stockholders of defunct bank, Constitutional—Due Process of Law.**

   Section 13, chapter 113, Public Laws 1927, is constitutional and valid, and is not in contravention of the Due Process Clause of the Federal Constitution or the Law of the Land Clause of the State Constitution, since under its provisions the statutory liability of a stockholder of an insolvent bank is not enforceable by execution under the order of the Corporation Commission until after he has been given notice and an opportunity to be heard in the course and practice of our courts, and an appeal has the effect of staying execution until his defense has been determined before a jury.

2. **Constitutional Law I b—Federal Constitution does not bind State as to procedure under Due Process Clause.**

   The Fourteenth Amendment to the Federal Constitution does not control the power of the State to determine the process by which legal rights may be asserted or legal obligations enforced if the method of procedure gives notice and a fair opportunity to be heard.

STACY, C. J., concurs in result only. BROGDEN, J., concurs with opinion in which CLARKSON, J., concurs.

APPEAL by petitioner, D. S. Murphey, from *Grady, J.,* at Chambers, Jacksonville, N. C., on 13 January, 1929. Affirmed.

This is a motion made by the petitioner, D. S. Murphey, upon a special appearance, in a proceeding for the liquidation of an insolvent banking corporation, organized and doing business under the laws of this State. The proceeding was begun on 28 May, 1928, and is now prosecuted in the Superior Court of Duplin County by the Corporation Commission of the State under and pursuant to the provisions of chapter 113, Public Laws 1927.

The petitioner, D. S. Murphey, challenges the validity of an assessment made against him in said proceeding, by reason of his statutory liability as a stockholder of said insolvent corporation. The assessment was made by the Corporation Commission on 4 October, 1928, in accordance with the provisions of section 13, chapter 113, Public Laws 1927. The assessment, has been duly docketed in the office of the clerk of the Superior Court of Duplin County. The petitioner has failed to pay said assessment; the Corporation Commission has requested the clerk of the Superior Court to issue an execution on said assessment, to be levied on the property of petitioner, for its collection.

The petitioner contends that the statute under which the assessment was made is unconstitutional and that, therefore, the assessment is void. He prays that said assessment be declared void by the court, and that proceedings to enforce the same be enjoined.

The court was of opinion that the statute is constitutional in all respects, and that, upon the facts agreed at the hearing of the motion, the assessment is valid, and so adjudged.

From an order, in accordance with said opinion, the petitioner, D. S. Murphey, appealed to the Supreme Court.

I. M. Bailey and Beasley & Stevens for the Corporation Commission.
Shaw & Jones for the petitioner, D. S. Murphey.

CONNOR, J. The sole question decided by the court below and now presented to this Court for decision, is whether section 13, chapter 113, Public Laws 1927, is constitutional; no other question was or is presented for decision.

It is conceded that the proceeding for the liquidation of the Farmers Bank & Trust Company of Wallace, N. C., was duly begun by the Corporation Commission, and has been duly prosecuted in accordance with the provisions of chapter 113, Public Laws 1927; that said Bank & Trust Company is insolvent, unless there shall be included among its assets, the claim of said company against its officers and directors for damages resulting from their wrongful acts as such officers and directors; and that the petitioner, D. S. Murphey, is a stockholder of said company.

It is further conceded that the assessment by the Corporation Commission against the petitioner, D. S. Murphey, by reason of his statutory liability as a stockholder, was made in strict conformity with the provisions of section 13, chapter 113, Public Laws 1927. The said assessment is, therefore, valid unless said chapter 113, Public Laws 1927, and particularly section 13 of said chapter, is void, for that the same is unconstitutional, as contended by the petitioner.

Prior to the enactment of chapter 113, Public Laws 1927, it was held by this Court that under the statutes then in force, prescribing the procedure for the enforcement of the statutory liability of stockholders of a banking corporation, as individuals, upon the insolvency of said corporation, assessments could not be made against said stockholders, until the deficiency between the amount of the liabilities of the insolvent corporation, and the amount of its assets, in the hands of its receiver, available for the payment of dividends on the claims of depositors and other creditors, had first been determined. *Corp. Com. v. Bank,* 193 N. C., 113, 136 S. E., 362; *Corp. Com. v. Bank,* 192 N. C., 366, 135 S. E., 48. It was also held that the claim of the corporation against its officers and directors for damages, resulting from the wrongful acts of said officers and directors, was an asset of the corporation and that upon the insolvency of the corporation, and the appointment of a receiver, such claim passed to and ordinarily must be enforced by said receiver. *Douglass v. Dawson,* 190 N. C., 458, 130 S. E., 195. The procedure under the statutes in force prior to the enactment of chapter 113, Public Laws 1927, for the enforcement of the statutory individual liability of stockholders of an insolvent banking corporation, often proved ineffective, especially when long and expensive litigation became necessary to enforce claims against officers and directors for damages, resulting in or contributing to the insolvency of the corporation. Depositors and other creditors of an insolvent banking corporation, for whose security the statute imposing individual liability upon stockholders was enacted, often lost the benefit of the statute, because of delay in making assessments, and also because of difficulties encountered by receivers, appointed by the courts, in enforcing them.

To remedy the defects in the procedure under the former statutes, section 13, chapter 113, Public Laws 1927, was enacted. This section is the only provision of said chapter, directly affecting stockholders of insolvent banking corporations, as individuals. It is as follows:

"After the expiration of thirty days from the date of the filing of the notice of the taking possession of any bank, in the office of the clerk of the Superior Court, the Corporation Commission may levy an assessment equal to the stock liability of each stockholder in the bank, and shall file a copy of such levy in the office of the clerk of the Superior Court, which shall be recorded and indexed as judgments, and shall have the force and effect of a judgment of the Superior Courts of this State; and the same shall become due and payable immediately, and if not paid execution may at the instance of the Corporation Commission issue against the stockholder delinquent, and actions on said assessment may be instituted against any nonresident stockholders in the same manner as other actions against nonresidents of the State. Any stockholder may appeal to the Superior Court from the levy of assessment; the issue raised by the appeal may be determined as other actions in the Superior Court. At any time before the determination of said appeal such stockholder may petition the resident or presiding judge to relieve his property of the lien, pending the determination of the question raised by said appeal; and such relief may be granted in the discretion of the judge hearing the petition and upon such terms as he may fix. The rights of levy and assessment herein given shall not affect the right of the Corporation Commission to enforce the liability of legal or equitable owners of stock not named in the certificate and the liability of transferers of stock as provided in section two hundred and nineteen (d). All sums collected under the levy shall become immediately available as general assets of the bank for distribution as other assets; *Provided, however,* that whenever the expenses of liquidation have been paid and all of the liabilities to depositors and other creditors shall have been discharged, the money then remaining in the hands of the Corporation Commission shall be applied pro rata to the repayment of the amounts paid in by the stockholders."

The contention that the foregoing statute is in violation of provisions of the Constitution of the United States and also of the Constitution of this State, in that stockholders of insolvent banking corporations, under the procedure prescribed therein, may be deprived of their property, without due process of law, or contrary to the law of the land, cannot be sustained.

Stockholders of banking corporations, organized and doing business under the laws of this State, are liable, as individuals, for the contracts, debts and engagements of the corporation, by statute, within the limitation prescribed therein. 3 C. S., 219(a). Such stockholders subscribe for or purchase stock in such corporations with notice of their statutory liability, as individuals. When a banking corporation is adjudged insolvent, because its assets, available for the payment of its liabilities, are not sufficient for the payment of the same, each stockholder has notice that he is liable to an assessment on account of his individual, statutory liability. He is interested then only in the amount or amounts for which he may be assessed on account of such liability. Under the procedure prescribed by the statute, he has notice that the corporation has been adjudged insolvent; he also has notice of the amount of the assessment made against him. He may appeal from the assessment to the Superior Court of the county in which the proceeding for the liquidation of the corporation is pending; on his appeal, all issues raised by him, whether of law or of fact, involving his liability on the assessment, will be determined, in accordance with the procedure for the trial of actions brought and prosecuted in the Superior Court. The stockholder is thus assured that he cannot be deprived of his property without due process of law, or contrary to the law of the land. He is given an opportunity to be heard before his property can be sold under execution for the payment of his assessment. *Davidson v. New Orleans,* 96 U. S., 97, 24 L. Ed., 616.

It cannot be held that under the procedure prescribed by the statute, an assessment can be made against a stockholder of an insolvent banking corporation without notice to him, or without an opportunity to be heard as to the validity of the assessment. Provision is made in the statute for notice to all persons that the Corporation Commission, as an agency of the State, has taken possession of the corporation and of its business; this notice must be filed in the office of the clerk of the Superior Court of the county in which the principal office of the corporation is located. Stockholders as well as others are affected by this notice. No assessment can be made by the Corporation Commission until the expiration of thirty days from the date of the filing of this notice. In the meantime the corporation has ceased to do business, and the Corporation Commission has had exclusive possession and control of its affairs; officers, directors and stockholders have been deprived of possession and control of the corporation. Notice of the insolvency of the corporation is sufficient notice to each stockholder of his liability to an assessment for the benefit of depositors and other creditors of the insolvent corporation. *Bernheimer v. Converse,* 206 U. S., 516, 51 L. Ed., 1163. To hold otherwise would seem to be "sticking in the bark"; it would be to ignore the facts apparent to all.

The statute further provides that a copy of assessments made against stockholders, on account of their individual liability, imposed by statute for the benefit of depositors and other creditors, shall be filed in the office of the clerk of the Superior Court. Each stockholder is thus notified of the amount due by him on his assessment. If a stockholder, or any person assessed as a stockholder, has a defense to the assessment, he may appeal to the Superior Court; there he will be heard, as to any matters of law or fact, upon which he relies for his defense. Thus ample notice of his liability to assessment, and full opportunity to be heard as to its amount is provided by the statute for each stockholder or person assessed as a stockholder, by the Corporation Commission. The fact that the opportunity to be heard is given by an appeal to the Superior Court, after the assessment has been made, does not deprive him of due process of law. *Coffin Bros. & Co. v. Bennett,* 277 U. S., 29, 48 Sup. Ct. Rep., 422. In his opinion in the cited case, decided 30 April, 1928, speaking of a provision in the Banking Act of Georgia, similar to the statute now under consideration, *Mr. Justice Holmes* says:

"A reasonable opportunity to be heard and to present the defense is given, and if a defense is presented, the execution is the result of a trial in court . . . . The fact that the execution is issued in the first instance by an agent of the State, but not from a court, followed as it is by personal notice and a right to take the case into court, is a familiar method in Georgia, and is open to no objection. If a debtor does not demand a trial, the execution does not need the sanction of a judgment; the plaintiffs in error by becoming stockholders had assumed the liability on which they are to be held."

Doubtless, in the administration of this statute, the Corporation Commission will, as a matter of practice, in addition to the constructive notice to stockholders, as provided by statute, which we hold is sufficient to uphold the statute, give actual, personal notice to each stockholder, by mail or otherwise, before the assessment is made, and also before execution is issued to enforce the assessment. Execution can be issued only when the stockholder has failed to pay the assessment, upon demand by the Corporation Commission, and is, therefore, delinquent.

The assessment, although duly docketed and indexed as required by the statute, in order to make the assessment a lien on the property of the stockholder, is not a judgment in the sense that it is conclusive; it can be enforced by execution only where there is no appeal from the assessment. An appeal stays execution to enforce the assessment; provision is made by the statute by which the stockholder may have his property relieved of the lien of the assessment, pending the hearing of his appeal. Opportunity is given to the stockholder, even after execution has been issued on the assessment, and is in the hands of the sheriff, by appeal to the Superior Court, to interpose a defense, if any he has, to the assessment or to his liability therefor. The property of the stockholder, upon which the execution has been levied, cannot be sold without personal notice to the stockholder, at least ten days before the sale. C. S., 689.

It has been held by the Supreme Court of the United States that the essential elements of due process of law are notice and opportunity to defend, and that in determining whether such rights are denied, that Court will be governed by the substance of things, and not by the mere form, *Simon v. Craft,* 182 U. S., 427, 21 Sup. Ct. Rep., 836, 45 L. Ed., 1165, that the Fourteenth Amendment safeguards fundamental rights and not the mere form which a state may see proper to designate for the enforcement and protection of such rights, *Cincinnati Street R. Co. v. Snell,* 193 U. S., 30, 24 Sup. Ct. Rep., 319, 48 L. Ed., 604, and that the Fourteenth Amendment in no way controls a state in determining the process by which legal rights and obligations may be asserted or enforced, provided the method of procedure adopted for that purpose gives reasonable notice and fair opportunity to be heard before the issues are decided, *Iowa C. R. Co. v. Iowa,* 160 U. S., 389, 16 Sup. Ct. Rep., 344; 40 L. Ed., 467.

It has also been held that the words "due process of law" as used in the Constitution of the United States do not necessarily imply a regular proceeding in a court of justice, or after the manner of such courts. *Davidson v. New Orleans,* 96 U. S., 97, 24 L. Ed., 616; due process is not necessarily a judicial process, *Reetz v. Michigan,* 188 U. S., 505, 23 Sup. Ct. Rep., 390, 47 L. Ed., 563. Public officers and boards in determining the existence of facts and the application to them of rules of law, perform administrative, not judicial, duties, and their proceedings are due process of law, *Den ex Dem Murray v. Hoboken Land & Imp. Co.,* 18 How., 272, 15 L. Ed., 372.

It has been held by this Court that although a statute providing for the condemnation of land for street purposes contains no express requirement for notice to the landowner whose land is to be taken for that purpose, such requirement will be implied from other provisions of the statute, and that the statute, therefore, does not violate constitutional provisions with respect to due process of law, or with respect to the taking of property contrary to the law of the land. *S. v. Jones,* 139 N. C., 613, 52 S. E., 240, 2 L. R. A. (N. S.), 313. In the instant case, the statute requires notice to the stockholders, by the filing of the notices in the clerk's office that the Corporation Commission has taken possession of the corporation, and has made the assessments; no proceeding for the enforcement of an assessment is authorized until the stockholder has become delinquent, *i. e.,* has failed or refused, without appeal, to pay the assessment, upon demand. Actual, personal notice to the stockholder is required before execution can be issued. Upon receiving such notice, the stockholder may at once appeal from the assessment to the Superior Court where full opportunity is given him to make his defense to the assessment.

Other grounds upon which it is contended that the statute is unconstitutional are involved in the contention that the statute is in contravention of constitutional provisions relative to due process of law. Contentions based upon these grounds have been duly considered; they cannot be sustained. The Corporation Commission, in making assessments against stockholders, under the statute, and in enforcing the same, acts as an agency of the State, and not in its own interest. It exercises powers, *quasi*-judicial, as well as administrative, both in making the assessments and in enforcing the same. It does not exercise these powers for its own benefit, but for the benefit of depositors and other creditors of the insolvent corporation who have relied upon the statutory liability of the stockholders of the banking corporation and also for the benefit of stockholders. All assessments made by the Corporation Commission are subject to review by the Superior Court, upon appeal by the stockholder, or person assessed, both with respect to matters of law and of fact. The philosophy of the statute is that depositors and other creditors of a banking corporation, who have been induced to make deposits, and to enter into contracts with the corporation, by assurance that the stockholders are by statute individually liable for the contracts, debts and engagements of the corporation, shall be protected upon the insolvency of the corporation, and shall not be unduly delayed in the enforcement of their claims against the corporation by litigation.

As to whether the claim of a banking corporation against its officers and directors for damages caused by their wrongful acts, should be considered in determining whether or not the corporation is insolvent, and stockholders are, for that reason, liable to assessment, is not presented by this record. This claim is an asset of the corporation, which upon its insolvency passes to and vests in the Corporation Commission, as its statutory receiver. It is usually involved in litigation, and is not ordinarily available for the payment of depositors and other creditors, until after long and expensive litigation. This must be considered in determining its value, as an asset, and therefore whether or not, notwithstanding the claim, the corporation is insolvent at the time assessments are to be made, or was insolvent at the time they were made against stockholders. The finding of the Corporation Commission that a banking corporation is insolvent, and that therefore its stockholders are liable to assessment, is presumed to be correct. In any event, stockholders who have paid their assessments, after the expenses of the liquidation have been paid, and all of the liabilities to depositors and other creditors have been discharged, are entitled to the money remaining in the hands of the Corporation Commission, to be paid to them pro rata.

We concur with the learned judge who presided at the hearing in the Superior Court that the statute does not violate provisions of the Constitution of the United States, or of the Constitution of this State, with respect to due process of law; that the statute is constitutional in all respects, and that, upon the facts agreed at the hearing, the assessment is valid. The order is

Affirmed.

STACY, C. J., concurs in result only.

BROGDEN, J., concurring in result. I have grave doubt as to the constitutionality of the statute because it does not provide for notice to the stockholder before judgment and execution. Execution cannot issue except upon a regular judgment, regularly obtained according to law. I do not agree that the judgment mentioned in the statute, is a tadpole judgment. It appears to me that it is a full fledged frog from the beginning. Furthermore, the only case cited to support this phase of the statute is the *Bennett case*. It is to be noted, however, that the Georgia statute expressly provides for personal notice before judgment.

It is declared in the opinion, "An appeal stays execution to enforce the assessment." Consequently, a stockholder cannot be compelled to pay until his defense has been determined by a jury. This result saves the day.

I am authorized to say that *Clarkson, J.*, concurs in this view of the case.

PENDER COUNTY, NORTH CAROLINA, v. A. W. KING, SHERIFF OF PENDER COUNTY, AND THE NATIONAL SURETY COMPANY OF NEW YORK; J. E. HENRY, N. H. LOCKHART, JAMES A. DEW, J. M. MARSHALL, R. E. MOORE, C. D. McGOWAN, R. L. BATTS AND MRS. LORENA B. HUMPHREY, ADMINISTRATRIX OF J. T. BLAND, DECEASED.

(Filed 10 April, 1929.)

1. **Principal and Surety B a—Separate cause of action exists on each bond of sheriff given for successive terms.**

   The various bonds separately required to be given by the sheriff for the proper accounting for and paying of moneys received by him as sheriff by the provisions of C. S., 3930, impose a distinct liability on the sureties on each bond separately for the terms of office for which given, and where one is given by the same surety for the same sheriff for more than one successive term, the giving of the bond for the succeeding term does not discharge the bond previously given nor release the surety from liability thereon, and a separate cause of action lies against the surety on the bond for each term.

2. **Principal and Surety B c—Liability of surety on sheriff's bond unaffected by statutes changing salary.**

   The liability of a surety on a sheriff's bond, given under the provisions of C. S., 3930, is not affected by the fact that the sheriff, pending the life of the bond, has been put upon a salary instead of a fee basis, or the amount of his salary has been changed under the authority of a statute.

3. **Principal and Surety B c—Liability of surety on sheriff's bond when he is appointed by county commissioners.**

   Where under the provisions of C. S., 3932, the board of county commissioners has declared the office of sheriff of that county vacant for his failure to give the bonds required by C. S., 3930, and has appointed another who likewise failed to give the bonds, and has again appointed the former sheriff, who gives the necessary bonds and then qualifies, his term is by virtue of his appointment by the board of county commissioners, and the liability of the sureties on his official bonds commences from the time of his appointment.

4. **Pleadings D c—Demurrer for misjoinder of parties and causes in action against sheriff and his sureties on bonds for successive terms.**

Where a sheriff has been elected for successive terms of office, and appointed for a third term by the county commissioners after the office for his third term had been declared vacant, an action against him and the sureties on his bonds given under the provisions of C. S., 3930, for defalcation during the successive terms is a misjoinder of parties and causes of action, and a demurrer thereto is good.

APPEAL by plaintiff from *Harris, J.*, at January Term, 1929, of PENDER. Affirmed.

Facts alleged in complaint: (1) A. W. King was duly elected sheriff of Pender County, at the general election of 1922, for a term of two years, and filed an "execution" bond, as required by law, in the sum of $5,000. He also filed a bond with the National Surety Company of New York, defendant, as surety, in the sum of $35,000, as required by law, for the collection and accounting for all county and other local taxes, and entered upon the discharge of his duties on the first Monday in January, 1923. (2) He was reëlected at the general election in 1924, for a term of two years and filed an "execution" bond, as required by law, in the sum of $5,000, and also filed a bond with the National Surety Company, defendant, as surety, in the sum of $35,000, as required by law, for the collection and accounting for all county and other local taxes, and entered upon the discharge of his duties, on the first Monday in December, 1924. (3) He was reëlected at the general election in 1926, and held over until 3 January, 1927, when the board of county commissioners of Pender County declared the sheriff's office vacant and appointed another sheriff, on account of the said King having failed to account for and settle the taxes for the year 1925, and file bond as required by law. On 4 April, 1927, the said board of county commissioners of Pender County declared the office vacant on account of the appointee of the board having failed to file bond as required by law and appointed defendant, King, sheriff, who filed an "execution" bond in the sum of $5,000, as required by law, with the National Surety Company of New York, as surety; also a bond for the faithful collection and accounting for all county and other local taxes, as required by law, in the sum of $30,000, with J. T. Bland, Sr., J. E. Henry, N. H. Lockhart, James A. Dew, J. M. Marshall, R. E. Moore, C. D. McGowan, and R. L. Batts. All of the bonds are recorded in the office of the register of deeds of Pender County. That one of the duties of the office of the sheriff of Pender County is to collect the taxes, and the said defendant has been the only tax collector for Pender County since he was first inducted into office on the first Monday in January, 1923, and continued to collect taxes from 3 January, 1927, to 4 April, 1927, and thereafter.

The following taxes, etc., collected by defendant King, sheriff, have not been accounted for by him:

Garysburg Mfg. Co., 1926 taxes, collected 4-30-27	$5,676.57
P. S. Carr, 1926 taxes	158.10
D. D. Sparkman, Jr., 1926 taxes, collected 6-29-27	184.74
Sheriff's fees	375.65
	$6,395.06

$17.00 from Ransom Tate, col., on 1923 taxes in Union Township, paid 31 December, 1923.

$24.73 from C. B. Bordeaux for 1922 taxes, in Canetuck Township, paid 19 April, 1924.

$93.00 from G. Kornegay for 1923 taxes, in Burgaw Township, paid 14 October, 1924.

That the plaintiff has made demand on defendant, A. W. King, for settlement of said amounts, and he has failed and refused to settle same. That J. T. Bland, Sr., is dead and Lorena B. Humphrey has been duly appointed administratrix of his estate.

The following demurrer was filed by defendants: "1. There is a misjoinder of causes of action, and also a misjoinder of parties defendant, for that the complaint alleges that the defendant, A. W. King, was sheriff of Pender County for three separate terms of two years each, that the National Surety Company was on his bond as tax collector for two terms, and the other defendants were sureties on his tax bond for the term beginning 4 April, 1927, and ending the first Monday in December, 1928, and that the individual defendants, sureties on said last mentioned bond, are not in any way liable for, or interested in, any alleged shortage for any time prior to the date of the bond, and for that the National Surety Company is not interested or suable for any alleged shortage or failure to account on the part of the sheriff for funds that came into his hands during his last term of office. (2) For that there is a misjoinder of causes of action, for that causes of action are alleged growing out of the first term of office and of the second term of office, and the third term of office of Sheriff King, whereas, the law requires settlement to be made with the sheriff every year, and that certainly the alleged shortages during each term of office would be necessarily a separate cause of action. (3) There is a defect as to parties defendant, in that the National Surety Company is not interested in the causes of action against the individual defendants other than A. W. King, and said individual defendants are not in any way interested in the causes of action alleged against the National Surety Company and A. W. King.

The court below sustained the demurrer. The plaintiff assigned error and appealed to the Supreme Court.

C. E. McCullen for plaintiff.
Isaac C. Wright and David H. Bland for defendants.

CLARKSON, J. C. S., 3930, is as follows: "*Sheriff to execute three bonds.* The sheriff shall execute three several bonds, payable to the State of North Carolina, as follows: One conditioned for the collection and settlement of State taxes according to law, a sum not exceeding the amount of the taxes assessed upon the county for State purposes in the previous year. One conditioned for the collection and settlement of county and other local taxes according to law, a sum not exceeding the amount of such county and other local taxes for the previous year. The third bond, for the due execution and return of process, payment of fees and moneys collected and the faithful execution of his office as sheriff, shall be not more than five thousand dollars, in the discretion of the board of county commissioners, and shall be conditioned as follows:

"The condition of the above obligation is such that, whereas the above bounden .... is elected and appointed sheriff of .... County; if, therefore, he shall well and truly execute and due return make of all process and precepts to him directed, and pay and satisfy all fees and sum of money by him received or levied by virtue of any process into the proper office into which the same, by the tenor thereof, ought to be paid, or to the person to whom the same shall be due, his executors, administrators, attorneys, or agents; and in all other things well and truly and faithfully execute the said office of sheriff his continuance therein, then the above obligation to be void; otherwise to remain in full force and effect." The State now assesses no tax on land in a county for State purposes. In the present action the second and third bonds were given. C. S., 3931, county commissioners to take and approve bonds. C. S., 3932, duty of county commissioners when bond insufficient, etc.

"After a thorough examination of the authorities this Court held in *S. v. Martin,* 188 N. C., 119, that each bond of a clerk is liable only for defalcations occurring during the term for which the bond is given, even though the principal and surety be the same for all terms. *Stacy, J.,* writing for the Court, said: 'Each term, like every tub of Macklinian allusion, must stand on its own bottom.'" *Gilmore v. Walker,* 195 N. C., at p. 464. *Jacksonville v. Bryan,* 196 N. C., 721.

It is settled in this jurisdiction that when the term of office is more than one year official bonds given by an officer during any one term of office are cumulative, and the new bond does not discharge the old one. *S. v. Martin, supra; Oats v. Bryan,* 14 N. C., 451; *Bell v. Jasper,* 37 N. C., 597; *Moore v. Boudinot,* 64 N. C., 190; *Pickens v. Miller,* 83 N. C., 544; *Fidelity, etc., Co. v. Fleming,* 132 N. C., 332.

The National Surety Company of New York, as surety, was liable for the alleged defalcation of Sheriff King for (1) The first term of two years—King qualified the first Monday in January, 1923 (should have qualified first Monday in December); (2) Second term of two years qualified first Monday in December, 1924. King was reëlected in general election of 1926, and held over until 3 January, 1927, and on account of not making settlement and filing bond the office was declared vacant. C. S., 3926, 3931. *Lenoir County v. Taylor,* 190 N. C., 336. The appointee of the board of county commissioners of Pender County, having failed to give bond, the office again was declared vacant and King appointed sheriff. He filed, on 4 April, 1927, an "execution" bond in the sum of $5,000, with National Surety Company of New York, as surety, and for the faithful collection and accounting for all county and local taxes as required by law a bond in the sum of $30,000, with J. T. Bland, Sr., and others as sureties.

All the taxes and fees unaccounted for by King, sheriff, appear from the record were collected in the years that the National Surety Company of New York was on his bond, except taxes $5,676.57, collected 30 April, 1927, and $184.74 collected 29 June, 1927.

The third term King held the office of sheriff, not by virtue of his election, as he failed to comply with the law and was disqualified, another was appointed and he did not qualify, and King was then appointed sheriff by the board of county commissioners of Pender County, and held the office by virtue of the statute.

It is said in *Lenoir County v. Taylor, supra:* "Upon the failure of a sheriff-elect to give bonds required by law, the board has power to elect some suitable person in the county as sheriff for the unexpired term." C. S., 3932.

The board it is presumed elected a suitable person sheriff, who did not qualify and his office was declared vacant, and King was appointed sheriff and qualified and gave the bonds required. He held by virtue of his appointment, not his election. Chapter 482, Public-Local Laws 1921, applicable to Pender County, put the sheriff and other officers on a salary basis. Section 7, is as follows: "The officers hereinbefore mentioned shall faithfully perform all the duties of their several offices imposed upon them by law, and shall receive no other compensation or allowance whatsoever for any extra or additional service rendered to the county or State governmental agencies, and they shall be liable to all the pains and penalties now or hereafter provided for failure to perform the duties of their several offices." This act merely placed the sheriff on a salary instead of a commission basis.

In *Commissioners v. Bain,* 173 N. C., at p. 378-9, it is said: "It has been the custom in this State for the retiring sheriff to collect the taxes due on tax lists already in his hands, and this custom has the sanction of numerous judicial decisions: In *Fitts v. Hawkins,* 9 N. C., 396, *Taylor, C. J.,* says: 'A sheriff who is elected for the first time has nothing to do with the list of the preceding year before he was in office. The clerk has delivered them to his predecessor, who alone has authority to collect under them; and the law makes no provision for setting them over to the new sheriff, as in case of prisoners and writs. If he receive the lists and collect the taxes, it must be in consequence of some private arrangement between the predecessor and himself, which cannot undoubtedly bind his sureties in this form of proceeding, for if it could they would be responsible for two years instead of one (at that time sheriff's term was one year). If the sheriff is reëlected he is then bound to collect the taxes of the preceding year; but this is by virtue of his former appointment, and under the responsibility of his old bond.'" See cases cited in the opinion.

The appointment of King as sheriff by the board of commissioners of Pender County on 4 April, 1927, made him a new sheriff, he did not comply with Public-Local Laws 1927, chapter 123. Section 10 of the act, relative to other things, also increased the sheriff's salary to $4,800 per annum.

It may be noted the decisions on the questions involved are often governed by local as well as general statutes.

The question involved: Can *one action,* under the facts and circumstances of this case, be brought against King, for alleged defalcations, and the National Surety Company of New York, his surety, on the bonds for the first two terms mentioned and on the "execution" bond for appointment term and against J. T. Bland, Sr. (his administratrix) and others, his sureties, for the term which he was appointed and not elected? We think not.

In *Bank v. Angelo,* 193 N. C., at p. 578, citing numerous authorities, it is said: "It is well settled that where there is a misjoinder, both of parties and causes of action, a demurrer is interposed upon this ground, the demurrer should be sustained and the action dismissed."

King and his sureties all demurred to the complaint. The demurrer must be sustained. *Blackmore v. Winders,* 144 N. C., 212, is not applicable from the facts on this record.

Is Sheriff King's "execution" bond liable for fees which it is alleged that he collected as sheriff when he was placed on a salary basis? We think so.

The third bond and the form set forth by the statute requires, in clear language, payment of fees and money collected. The bond required shall not be more than $5,000. C. S., 3930, *supra.* Under Public-Local Laws 1921, ch. 482, sec. 7, *supra,* the salary basis does not affect the provisions of the bond. The statute, section 7, says "Shall be liable to all the pains and penalties now or hereafter provided for failure to perform the duties of their several offices." To the same effect is section 10 of chapter 123, Public-Local Laws 1927.

As to the second ground of demurrer, as to misjoinder of several causes of action, see C. S., 507, 516; *S. v. McCanless,* 193 N. C., 200.

As to the third ground of demurrer, as to defect of parties, see N. C. Code 1927, annotated; C. S., 511. We think it unnecessary to consider the second and third grounds of demurrer.

The demurrer is sustained as to all the defendants. For the reasons stated, the judgment below is

Affirmed.

WINDSOR REDRYING COMPANY BY AND THROUGH ITS RECEIVERS, M. B. GILLAM AND J. H. BONNER, BY THE COURT REGULARLY APPOINTED, v. W. B. GURLEY, J. C. BELL, J. L. PRITCHARD, J. T. STOKES AND W. L. POWELL, TRADING AS POWELL & STOKES; H. M. BELL, P. R. GILLAM AND THOMAS GILLAM, JR., EXECUTORS OF THOMAS GILLAM; E. L. GATLING, MARY G. FREEMAN, ADMINISTRATRIX OF J. W. FREEMAN; J. B. GILLAM, C. W. SPRUILL, W. S. PRITCHARD, B. GOLDSTEIN, P. R. GILLAM, ADMINISTRATOR OF FRANCIS GILLAM; P. R. GILLAM, ASA B. PHELPS BY S. E. PHELPS, RECEIVER, AND J. E. WHITE.

(Filed 10 April, 1929.)

1. **Limitation of Actions A b—Construction of statutes in action for amount unpaid on capital stock of corporation.**

The application of the three-year statute of limitations, C. S., 441(1), will be construed in regard to the unpaid balance due a corporation by a subscriber to its capital stock, *in pari materia* with C. S., 1165, authorizing a call on them for assessments by the directors of the corporation from time to time, and C. S., 1160, creating an obligation on each stockholder, enforcible by the receiver, for the amount due on his subscription necessary to satisfy the creditors of the corporation.

2. Limitation of Actions A b—Limitation of action for amount unpaid on capital stock of insolvent corporation.

While as to the stockholders the three-year statute of limitations on the amount unpaid on subscriptions to the capital stock of a corporation will run from the time of demand by the directors, it is otherwise as to the creditors where the corporation has become insolvent, for in the latter case the capital stock is regarded as a trust fund for the benefit of creditors, and the statute will begin to run from the demand of the receiver, representing the creditors, under the order of the court. C. S., 441(1), 1160, 1165.

APPEAL by plaintiffs from *Midyette, J.*, and a jury, at August Term, 1928, of BERTIE. Reversed.

A corporation, known as the Windsor Redrying Company, was organized under the laws of North Carolina, on 25 February, 1920, to further the tobacco market in the town of Windsor, N. C., Bertie County, and that section of the State, by redrying tobacco. Numerous persons subscribed for stock in the corporation. Some of the defendant subscribers to stock have paid part of their subscription and the balance is unpaid. The main defense relied on by the defendants was the statute of limitations, which each plead.

Four calls of 25 per cent for payment of subscriptions to stock were made by order of the directors and stockholders of the corporation, on each of the defendants who are being sued, between 1 March and 1 September, 1920.

H. M. Bell, Secretary of the corporation, testified: "Q. In what installments, if any, were you directed and authorized to make the calls? Ans. Twenty-five per cent. Q. In pursuance of that order by the directors did you make all the calls? Ans. Made four calls. Q. Between what times, as near as you can tell, did you make them? Ans. Between the first of March and the first of September, 1920. Q. Did you make those calls on each of these defendants who are being sued? Ans. Yes, sir."

The company has become hopelessly insolvent. A judgment had been taken on 5 November, 1923, against the corporation by W. T. Tadlock for $2,705.65, interest and costs. In an action brought by W. B. Gurley against Windsor Redrying Company, M. B. Gillam and J. H. Bonner were appointed temporary receivers on 17 January, 1924, and made permanent receivers on 6 February, 1924, to wind up the affairs of the corporation. In November, 1924, W. T. Tadlock filed petition for permission to be made a party plaintiff, in order to require the suits to be brought against stockholders who had not paid their subscriptions. Suit was ordered to be brought against delinquent stockholders by order of the court on 30 January, 1926. At February Term, 1926, the court appointed H. G. Harrington referee, and giving him instructions to ascertain who the stockholders were and the names and amounts of those who had not paid their subscriptions for stock and make report to the court. In the present action no minute book of the transactions of the corporation was kept. The minutes were kept by the Secretary "on a little piece of paper." The original subscription list was lost by the president, showing the names of the incorporators and amounts subscribed. One hundred dollars reward was offered to any one who "could find it." Mr. Harrington's report was filed 20 June, 1927. Demand on the defendants, stockholders, for their unpaid subscriptions were made shortly after 20 June, 1927, by plaintiffs, receivers. This was the first and only effort made by the receivers to collect the unpaid subscriptions. The order of court was made August Term, 1927, directing the receivers to bring this action. This action was instituted on 3 February, 1928, to obtain necessary funds from the delinquent subscribers to stock to pay the outstanding indebtedness of the insolvent corporation.

It was admitted by all defendants that at the time the receivers were appointed the indebtedness of the corporation to creditors was in excess of its available assets, plus the amount of unpaid subscriptions to stock now being sued for.

The issue submitted to the jury was as follows: "Is plaintiff's cause of action against the defendants, and each of them, barred by the statute of limitations, as alleged in the answer?"

The court charged the jury, "If you believe the evidence and find the facts to be true as sworn to by the witnesses in this case to answer the issue Yes." To the charge plaintiffs excepted and assigned error. In apt time the plaintiffs asked the court to charge the jury, "that if they believe all of the evidence and find the facts to be as testified to by the witnesses to answer the issue No." This the court refused to charge, and to such refusal the plaintiffs excepted and assigned error.

Winston & Mathews for plaintiffs.

J. B. Davenport, J. A. Pritchett and Stephen C. Bragaw for defendants.

CLARKSON, J. The only question we think necessary to consider: Is this action barred by the statute of limitations? We think not.

The defendants plead the three-year statute of limitations, C. S. 441(1): "Upon a contract, obligation or liability arising out of a contract, express or implied, except those mentioned in the preceding sections."

This is a general statute and it must be construed in *pari materia* with the statutes relating to corporations.

Section 1165, C. S., in part, is as follows: "The directors of a corporation may, from time to time, make assessments upon the shares of stock subscribed for, not exceeding, in the whole, the par value thereof, remaining unpaid; and the sums assessed shall be paid to the treasurer at such times and by such installments as the directors direct," etc., and provides for the sale of the share or shares of delinquent subscribers after notice. This provision is substantially sections 23, 24 and 25, Public Laws 1901, chapter 2, entitled "An act to revise the corporation law of North Carolina." It will be noted that this says the *directors of a corporation.*

C. S., 1160, is as follows: "Where the capital stock of a corporation *has not been paid in* and the *assets are insufficient* to *satisfy its debts and obligations,* each stockholder *is bound to pay* on each share held by him *the sum necessary to complete the amount of such share,* as fixed by the charter, or such proportion of that sum as is required to satisfy such debts and obligations," etc. This is substantially the same as Public Laws 1901, ch. 2, sec. 22.

R. R. v. Avery, 64 N. C., 491, is cited by defendants as authority on the plea of the statute of limitations. The gist of that case is as follows: "Where the charter of a railroad company provided, that upon the failure by subscribers to its stock to pay installments as called for, 'the directors may sell at public auction,' etc., such stock, and, in case enough were not produced thereby to satisfy the subscription, might sue for and recover the balance from such subscriber: *Held,* that upon a failure by a subscriber to pay installments as called for, it was optional with the company to bring suit against him without making sale as above or, to sell, and sue for the balance. Also that the plea of the statute of limitations barred a recovery of so much of such subscription as was included in calls made more than three years before suit was commenced." In that case the Court said, at p. 493: "Of course then, the statute commenced to run when the cause of action accrued, to wit, as to each installment, when it became due by the call of the company. 3 Parsons on Contr., 93. If a bill or note be payable by installments, the statute begins to run from the date of each installment respectively. *Gary v. Pindar,* 2 B. & P., 427."

It will be noted that the charter of the Western Railroad Company in the above case made provisions for calls similar to C. S., 1165, by its directors. That action was brought by the *corporation* against the *subscriber.* Here C. S., 1160, *supra,* makes provision for the *payment of debts* of the corporation by the *subscribers* of unpaid capital stock.

In the case of *Cooper v. Security Co.,* 127 N. C., 219, this Court said at pp. 220-1: "The opinion of the Court in *Hatch v. Dana,* 101 U. S., 205, contains a full discussion of this question, and is a direct decision on the point now before us. The syllabus of the decision, which is supported by the opinion, is in these words: 'Creditors of an incorporated company who have exhausted their remedy at law can, in order to obtain satisfaction of their judgment, proceed in equity against a stockholder to enforce his liability to the company for the amount remaining due upon his subscription, although no account is taken of the other indebtedness of the company, and the other stockholders are not made parties, although by the terms of their subscription, the stockholders were to pay for their shares 'as called for' by the company, and the latter had not called for more than thirty per cent of the subscriptions. . . . (p. 222). The defendant company is the agent of the defendant stockholder. We will refer to *Hawkins v. Glenn,* 131 U. S., 319, in support of his Honor's view on the statute of limitations, where it is held that the statute does not run, as against subscriptions to stock payable as called for, and the principal cannot object, and say that his agent failed in his duty, and thereby defeat creditors."

It is contended by defendant that *Hawkins v. Glenn* does not bear out the construction given to it by this Court in the *Cooper case* and refers to U. S. Supreme Court Reports Digest, Vol. 6, Limitation of Actions, but under (b) this is said: "The statute of limitations does not commence to run in favor of a stockholder of a company sued for an installment due on his stock, until a *formal call or assessment has been made by the company or by an order of the Court.* (Italics ours.) *Hawkins v. Glenn,* 131 U. S., 319, 9 Sup. Ct. Rep., 739; (Anno.), 33; 184; *Glenn v. Liggett,* 135 U. S., 533, 10 Sup. Ct. Rep., 867, 34, 262; *Glenn v. Marbury,* 145 U. S., 499, 12 Sup. Ct. Rep., 914, 36, 790."

Hereafter we will draw the distinction as to the application of when the statute of limitation commences to run as between the corporation and its stockholders and the creditors and the stockholders for unpaid subscriptions to stock under our statute. The *first* when a formal call or assessment has been made by the corporation or its stockholders; *second,* by the receiver representing the creditors by an order of the court.

In *Glenn v. Marbury, supra,* at p. 507, it is said: "In conformity with *Hawkins v. Glenn,* and *Glenn v. Liggett,* we hold that limitation commenced to run, in favor of the present defendant, only from the order in the Virginia court making the call or assessment on subscribers of stock. *Glenn v. Williams,* 60 Md., 93, 122, 123."

In *Harrigan v. Bergdoll,* 270 U. S., at p. 564, this is said: "The nature, the extent, and the conditions of the liability of a stockholder on account of stock not full paid depend primarily upon the law of the State or county by which the corporation was created. *Glenn v. Liggett,* 135 U. S., 533, 548, 34 L. Ed., 262, 268, 10 Sup. Ct. Rep., 867. Compare *Benedict v. Ratner,* 268 U. S., 353, 359, 69 L. Ed., 991, 997, 45 Sup. Ct. Rep., 566. That law determines whether the liability is to the corporation or is to creditors." *Bronson v. Schneider,* 49 Ohio, 438.

The *Cooper case* was decided 27 November, 1900. In 1901, C. S., 1160, *supra,* was enacted, following the trend in the *Cooper case,* looking towards protecting creditors, and provided that where the capital stock of a corporation had not been paid in and the assets are insufficient to satisfy its debts and obligations, each stockholder *is bound to pay on each share held by him,* etc., up to the amount of their subscription to pay the debts. The directors and stockholders in the present case directed the calls which was done, but did not follow it up and enforce payment by action. If this had been done, assets may have been realized sufficient to pay the creditors in whole or in part.

It is well settled in this jurisdiction and generally in the courts of the States of this Union; that they go very far to protect corporate creditors and it is the settled doctrine that capital stock, and especially unpaid subscriptions to the capital stock constitute a trust fund for the benefit of the creditors of the corporation. Upon the faith of the capital stock, composed of paid and unpaid subscriptions, credit is given to the corporation and the public dealing with the corporation has a right to assume that the capital stock either in money or money's worth will be paid in to pay the corporation creditors. *Marshall Foundry v. Killian,* 99 N. C., 501; *Hill v. Lumber Co.,* 113 N. C., 173; *Bank v. Cotton Mills,* 115 N. C., 507; *Holshouser v. Copper Co.,* 138 N. C., 248; *Silk Co. v. Spinning Co.,* 154 N. C., 421; *Drug Co. v. Drug Co.,* 173 N. C., 502; *Bassett v. Cooperage Co.,* 188 N. C., 511. N. C. Code, 1927, Anno., secs. 1156, 7, 8.

The unpaid stock subscriptions constitute a trust fund for the benefit of creditors. The stockholders select the directors of the corporation, who are their agents and operate for the stockholders the business of the corporation, for which it was organized. A call by the directors of the corporation, duly authorized, upon the stockholders for unpaid subscriptions to stock, so far as the rights of the stockholders in the corporation are concerned, the statute of limitations would begin to run from the time demand was made as to them, but not as to creditors. The stockholders and directors are trustees for the creditors. The demand by the directors of the corporation, an agency of the stockholders, would bind the stockholders so far as their rights were concerned, in regard to the statute of limitations. The directors and stockholders being trustees for the creditors, a demand by the receivers of the insolvent corporation representing the creditors for the unpaid subscriptions, the statute of limitations would begin the run when the order of the court was made. This course is logical and orderly, and, whatever may be the decisions in other courts, which we have examined with care, we think this is consonant with justice and good faith to those who give credit to a corporation relying on the capital stock to be paid. In reaching this conclusion, we give force to C. S., 1160, passed for the protection of creditors. We think that the statute of limitations begins to run when the receiver appointed to wind up the affairs of an insolvent corporation has been ordered by the court to make a call and has made a demand on the stockholders who had not paid their subscriptions. In the present action this demand was made by order of the court by the receivers shortly after 20 June, 1927, and the suit commenced on 3 February, 1928, and, therefore, this action is not barred by the statute of limitations. For the reasons given, the judgment of the court below is

Reversed.

STATE v. JETHRO VICKERS.

(Filed 10 April, 1929.)

1. **Husband and Wife A d—Judgment for support of abandoned wife sufficiently definite.**

   A judgment that the defendant be confined in the common jail for one year upon each count in the indictment, the term under one count to begin at the expiration of the term under the other, the judgment to be fully satisfied at the expiration of both terms, with provision that the judgment be suspended upon the payment to his abandoned wife and children certain monthly sums for a definite period and the giving of a bond for compliance therewith, is in this case held to be sufficiently certain and definite in its terms.

2. **Criminal Law L e—Refusal to hear evidence in executing suspended sentence within discretion of court and not reviewable.**

   The refusal of the judge to hear evidence in executing judgment under a suspended sentence is a matter within his legal discretion and is not reviewable on appeal.

APPEAL by defendant from *Devin, J.*, at December Term, 1928, of DURHAM. Affirmed.

At the trial of this action in the Superior Court of Durham County, May Term, 1928, defendant pleaded guilty to both counts in the indictment. From the judgment on these pleas, defendant appealed to the Supreme Court, contending that the judgment was void for that it was indefinite, with respect to the terms of payments to be made by him for the support of his wife and children.

The appeal was heard at the Fall Term, 1928, of the Supreme Court, 196 N. C., 239, 145 S. E., 175. The action was remanded to the end that the terms of the order, made pursuant to C. S., 4449, be more definitely prescribed and set forth in the judgment.

From judgment, in accordance with the opinion of the Supreme Court, defendant again appealed to the Supreme Court.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

J. W. Barbee and Victor S. Bryant for defendant.

PER CURIAM. The terms of the judgment from which the defendant in this action has again appealed to this Court, are definite. It is adjudged that defendant be confined in the common jail of Durham County, for one year upon each count in the indictment to which he has pleaded guilty, the term under the judgment on the second count to begin at the expiration of the term under the judgment on the first count. During said confinement, defendant is assigned to work on the public roads of Durham County. After such confinement, defendant will be entitled to his discharge. The judgment will then be fully satisfied.

It is provided, however, that the judgment shall be suspended upon the conditions specifically set out therein. These terms are reasonable, and not oppressive. They may be accepted or not by defendant, as he may determine. By the conditions imposed for the suspension of the judgment, defendant is required only to discharge the duty which under the law he owes to his wife and children. If he discharges this duty, the judgment will not be executed; if he fails to discharge this duty, he must abide the judgment.

The amounts to be paid monthly by defendant for the support of his wife and children were agreed to by defendant and counsel for his wife and children. He is required to pay to his wife the sum of $30.00 on the tenth day of each month, for the period of four years, or for such part of said four years as she shall remain his lawful wife. He is further required to pay the sum of $15.00 on the 10th day of each month for the support and maintenance of each of his children, until such child shall arrive at the age of 18. In the event that defendant accepts the conditions of said judgment, and undertakes to pay said sums for the support of his wife and children, he is required to file with the clerk of the court a bond in the penal sum of $1,000, conditioned for the payment of the sums specified. The judgment, in the event he files said bond is suspended; upon default in the conditions of the bond, its penal sum shall be paid to the clerk to be applied by him to the payment of the sums required of defendant for the support of his wife and children, respectively.

There was no error in the refusal of the court to hear evidence tendered by defendant upon the motion of the solicitor for the State for judgment. This was in the discretion of the court, and his action is not reviewable by this Court. The judgment is

Affirmed.

LESS LIPSCOMB v. GEO. H. COX AND H. C. PERKINS, TRADING AS COX & PERKINS.

(Filed 10 April, 1929.)

1. **Master and Servant C g—Contributory negligence of servant bars his recovery.**

   A servant's action against the master for damages for negligently injuring him while engaged in blasting rock in a quarry is barred by an adverse verdict on the issue of contributory negligence.

2. **Negligence C d—Burden of proving contributory negligence.**

   The burden of proof is on the defendant on the issue of contributory negligence in a personal injury action.

3. **Appeal and Error J e—Error must be prejudicial to appellant to entitle him to a new trial.**

   The appellant is not entitled to a new trial for error of law relating to an issue answered by the jury in his favor.

4. **Trial E c—Charge sufficient without charging alternate propositions of law.**

   Where the trial judge has charged correctly and fully upon the issue of contributory negligence in regard to the defendant, it is not error for him to fail to charge the alternate propositions of law in regard to the plaintiff, under the provisions of C. S., 564, requiring him to charge upon the principles of law arising from the evidence in the case.

APPEAL by plaintiff from *Moore, J.*, at February Term, 1928, of FORSYTH. Affirmed.

This action was begun and tried in the Forsyth County Court, by *Efird, J.*, and a jury. The issues were answered as follows:

"1. Was the plaintiff injured by the negligence of defendants, as alleged in the complaint? Answer : Yes.

"2. Did the plaintiff by his own negligence contribute to his injury, as alleged in the answer? Answer: Yes.

"3. What damages, if any, is the plaintiff entitled to recover of defendants? Answer: ...."

From judgment of the Forsyth County Court on the foregoing verdict, plaintiff appealed to the Superior Court of Forsyth County, assigning errors at the trial.

From judgment of the Superior Court, overruling each and all of plaintiff's assignments of error on his appeal to said court and affirming the judgment of the Forsyth County Court, plaintiff appealed to the Supreme Court.

Archie Elledge and Parrish & Deal for plaintiff.
Manly, Hendren & Womble for defendants.

PER CURIAM. During the month of August, 1926, plaintiff was an employee of defendants. Defendants were then engaged in the operation of a rock quarry in Forsyth County. This action is for the recovery of damages for personal injuries, resulting from an explosion of dynamite, which plaintiff, as an employee of defendants, was using in blasting rocks, at defendants' quarry.

The jury has found that plaintiff was injured by the negligence of defendants, as alleged in the complaint, but that plaintiff, by his own negligence, contributed to his injuries, as alleged in the answer. Plaintiff's recovery in this action is, therefore, barred by his contributory negligence. He contends, however, that he is entitled to a new trial, because of errors at the trial in the Forsyth County Court, which he duly assigned on his appeal to the Superior Court of Forsyth County.

On his appeal to this Court, plaintiff contends that there was error in the judgment of the Superior Court, overruling his assignments of error, and affirming the judgment of the county court. This contention is not sustained. There was no error in overruling plaintiff's assignments of error based on exceptions at the trial to the exclusion of testimony offered by plaintiff as evidence pertinent to the first issue. The answer of the jury to this issue was favorable to plaintiff. Nor was there error in the instructions of the court to the jury, with respect to the second issue. It is not contended that the instructions as given were erroneous; plaintiff contends that there was error in the failure of the court to instruct the jury in accordance with the requirements of the statute. C. S., 564. The charge of the court to the jury is set out in the case on appeal. It is full, clear and correct. The principle upon which a new trial was ordered by this Court in *Mehaffey v. Appalachian Const. Co.,* 194 N. C., 717, 140 S. E., 716, is not applicable in this case. The court instructed the jury that the burden on the second issue was on defendants; and that only in the event the jury should find from the evidence the facts to be as contended by defendants, and as stated specifically by the court, could the second issue be answered, Yes. The jury could not have failed to understand that if they did not so find the facts, they should answer the issue, No. In this case, the court was not required to instruct the jury that upon their failure to find facts as detailed in the instruction, they should answer the issue, No. A general instruction was sufficient. The judgment of the Superior Court is

Affirmed.

W. P. CONNOR v. FLEMING BROTHERS LUMBER & MANUFACTURING COMPANY, INC., AND GEO. W. FLEMING.

(Filed 10 April, 1929.)

1. **Trial G b—Verdict in this case held not inconsistent.**

   A verdict in an action against a corporation and individually against its president that the defendant corporation was answerable in damages for breach of plaintiff's contract of employment and that the plaintiff's mortgage for moneys loaned by the individual defendant was subject to be foreclosed is not objectionable as inconsistent.

2. **Evidence D a—Evidence not related to matters in controversy properly excluded.**

   Letters that do not relate to the matters in controversy are properly excluded as evidence.

3. **Same—Conversation that is evidence of indebtedness competent in foreclosure action.**

   Where the plaintiff seeks to enjoin the foreclosure of a mortgage, a conversation between himself and defendant that is evidence of the indebtedness that plaintiff denies, is competent.

4. **New Trial B g—New trial will not be granted where newly discovered evidence would not tend to change result.**

   A motion for a new trial will not be granted where the newly discovered evidence is not material to the answer to the issue and its consideration would not tend to vary the result.

APPEAL by plaintiff from *Sinclair, J.*, at June Term, 1928, of NEW HANOVER. No error.

Action to recover of defendant corporation damages for the wrongful discharge of plaintiff from its employment, in breach of the contract of said employment, and to restrain the foreclosure of a mortgage executed by plaintiff to the defendant, Geo. W. Fleming.

Plaintiff alleges that the mortgage is void, for that he was not indebted to the said Geo. W. Fleming, as recited therein, at the date of its execution; and that the execution of said mortgage and of the notes secured thereby were procured by the fraud of the said Geo. W. Fleming.

From judgment on the verdict, plaintiff appealed to the Supreme Court.

Isaac C. Wright for plaintiff.
Butler & Butler for defendants.

PER CURIAM. The jury, by its answer to the first issue, found that the defendant corporation did not enter into the contract with plaintiff, with respect to the terms of his employment, as alleged in the complaint.

It found, however, by its answer to the third issue, that plaintiff was wrongfully discharged by said defendant from its employment and assessed his damages at $200.00. The defendant corporation did not except to or appeal from the judgment that plaintiff recover of it the sum of $200.00. The jury, evidently found that plaintiff was employed by said defendant, by the year and not by the month, at the date of his discharge, as alleged by said defendant. Upon these findings of fact, the verdict is not inconsistent.

Plaintiff was employed by Geo. W. Fleming, acting as president of the defendant corporation. Upon the allegations of the complaint, and the evidence offered at the trial, the effect of the jury's answer to the first issue, was that the jury found that said Geo. W. Fleming did not enter into the contract with plaintiff, as alleged in the complaint, either officially or individually, and that, therefore, the money advanced for the purchase of the house and lot in Wilmington, N. C., for plaintiff was advanced by him, out of his own funds, and not out of the funds of the corporation as a loan to plaintiff. Plaintiff is, therefore, indebted to the defendant, Geo. W. Fleming, as found by the jury, and not to the corporation. This indebtedness was evidenced by plaintiff's notes, payable to the order of Geo. W. Fleming, and secured by mortgage to him. The notes are now past due and unpaid. There is no error in the judgment that defendant, Geo. W. Fleming recover of plaintiff the amount due on the notes, or in the decree for the foreclosure of the mortgage. There was no evidence to sustain the allegation in the complaint that the execution of the notes and mortgage was procured by fraud.

It was not error to exclude the letter written by a representative of the corporation to plaintiff, in 1921, offered in evidence by plaintiff. This letter had no probative value as to the matters in controversy. It tended only to show that plaintiff was then in the employment of the corporation, and that his services were satisfactory. These matters were not in controversy. They were admitted.

Nor was it error to overrule plaintiff's objection to the testimony of Geo. W. Fleming, with respect to a conversation between him and plaintiff. This testimony did not tend to show an offer of compromise. It tended to show plaintiff's willingness to surrender the house and lot to Geo. W. Fleming, the mortgagee. It was competent as evidence of the fact of plaintiff's indebtedness to Geo. W. Fleming, as evidenced by the notes and mortgage, and contradicted the testimony of plaintiff with respect to said notes and mortgage. *In re Clodfelter's Will,* 171 N. C., 528, 88 S. E., 625; *Baynes v. Harris,* 160 N. C., 307, 76 S. E., 230; *Daniel v. Wilkerson,* 35 N. C., 329.

Plaintiff's motion for a new trial, upon the ground of newly discovered evidence, first made in this Court, is denied. It is immaterial whether Geo. W. Fleming advanced the money for the purchase of the house and lot for plaintiff by his individual check or by the check of the corporation of which he is president. The weight of the evidence sustains his contention that the advancement was made by Geo. W. Fleming, individually, and not by him, as president of the corporation, in its behalf. It is doubtful whether, upon a new trial, the newly discovered evidence, would cause a different result from that of which plaintiff now complains. *Alexander v. Richmond Cedar Works,* 177 N. C., 536, 98 S. E., 780. The judgment is affirmed. We find

No error.

THE WAYNE NATIONAL BANK v. THE NATIONAL BANK OF LAGRANGE.

(Filed 17 April, 1929.)

1. **Insurance N c—Between mortgagees, one having prior registered mortgage has priority in proceeds under loss payable clause.**

   Where the owner of lands borrows money thereon under two separate mortgages from different persons, one registered prior to the other, and the mortgagor contracts with each to take out certain policies of fire insurance for their benefit, the rights of the mortgagees to the proceeds under the policies will be determined by the contracts as executed in the loss payable clauses in the policies, and where they are of the New York standard form, and made payable to the mortgagees "as interest may appear," the mortgagee under the prior registered mortgage has a superior lien on the proceeds to the one having the later registered security. C. S., 6420, 3311.

2. **Same—Where there are no priorities proceeds will be divided.**

   If neither of two mortgagees, for whom insurance has been procured, has any priority of claim or of liens, the proceeds of the policies will ordinarily be divided between them in proportion to their respective claims.

APPEAL by plaintiff and defendant from *Grady, J.,* at Chambers, 21 September, 1928. From LENOIR.

Controversy without action upon an agreed statement of facts. (1) The plaintiff is a National Banking Association with its principal office in the city of Goldsboro, and the defendant is a National Banking Association with its principal place of business in the town of LaGrange. (2) At the dates herein set forth J. E. Jones, of LaGrange, was the owner of three lots of land on which were situated two storage warehouses, which also he owned. (3) On 4 December, 1920, J. E. Jones and his wife executed and delivered to M. T. Dickinson a deed of trust conveying the property above described to secure the payment of a note for $15,000 due 60 days from date, executed by said Jones and made payable to the order of himself and by him negotiated to the plaintiff bank. The deed of trust was recorded 14 December, 1920. (4) On 11 May, 1925, J. E. Jones and wife executed and delivered to the defendant a mortgage on the property above described as security for the payment of a note for $5,000 due 1 October, 1925, executed by said Jones and his wife to said bank. The mortgage, which was duly registered, contains the following clause: "The parties further covenant and agree that they will effectuate and maintain a policy of fire insurance on the buildings situate on said property in the amount of $5,000, for the benefit of the party of the second part, the policy to carry the New York standard loss payable clause duly attached thereto in favor of the party of the second part, with the understanding and agreement that if the party of the first part shall fail to maintain such insurance, then the party of the second part may do so and the premium paid therefor shall be secured by this mortgage, the amount of such premium in that event to be deemed part of the principal indebtedness hereby secured." (5) The plaintiff required said Jones to take out and carry the fire insurance hereinafter mentioned and had in its possession said fire insurance policies. (6) The said J. E. Jones, on 21 December, 1927, effected fire insurance in his name on the storage warehouses on said lands above described in the Globe & Rutgers Fire Insurance Company, to which was attached a New York Standard Mortgage Clause with full contribution, in which, among other things it is provided "loss or damage," if any, under this policy, shall be payable to Wayne National Bank of Goldsboro, N. C., and the National Bank of LaGrange, as mortgagee (or trustee) "as interest may appear." On other dates, but after the execution of said mortgages and prior to the destruction of the buildings by fire as hereinafter set forth, the said J. E. Jones effected fire insurance in his name on the said storage warehouses on said lands above described, in five other fire insurance policies issued by four insurance companies, to each of which was attached the New York standard mortgage clause, payable in the identical manner as in the clause attached to the Globe & Rutgers Fire Insurance policy mentioned hereinbefore in this paragraph, that is, "loss or damage, if any, under this policy, shall be payable to Wayne National Bank of Goldsboro, N. C., and the National Bank of LaGrange, as mortgagee (or trustee) as interest may appear," the aggregate amount of the fire insurance in all six of said policies being $20,000. (7) On 15 January, 1928, the buildings on the lots above described which were covered by the insurance policies were injured by fire and the loss was adjusted by all the parties claiming an interest therein and there was paid by the insurance companies for the damage to said buildings amounts aggregating $11,250, represented by checks of said company payable to J. E. Jones, the Wayne National Bank, and the National Bank of LaGrange. (8) At the time of the fire there was due the plaintiff the sum of $12,760 with interest from 1 October, 1927, and there was due the defendant the sum of $5,000 with interest from 15 January, 1926.

The plaintiff contends that it is entitled to the entire amount of the moneys paid under said insurance policies, the amount due the plaintiff being in excess of the total amount of the fire insurance collected. It is contended by the defendant that it is entitled to one-half of said moneys if the indebtedness secured to it equals one-half of the said fire insurance fund so collected and now on deposit in the plaintiff bank, but that since the entire indebtedness to the defendant is $5,000 with interest from 15 January, 1926, until paid, which is less than one-half of the fire insurance fund, the defendant is entitled to $5,000 with interest from 15 January, 1926, and that the plaintiff is entitled to the excess of said insurance fund over the amount of $5,000 and interest. It was adjudged at the hearing that the plaintiff pay to the defendants the sum of $5,000 out of the moneys now in hand and that it retain the balance, to be applied by it on the indebtedness due it by said Jones, both sums to be credited on all of his indebtedness which said banks hold against said Jones.

From this judgment the plaintiff appealed, assigning as error the failure to hold that plaintiff is entitled to the whole of the proceeds of said insurance policies, to wit, the sum of $11,250; and the defendant appealed, assigning for error the failure to allow the defendant interest on $5,000 from 15 January, 1926, until paid.

Dickinson & Freeman for plaintiff.
Rouse & Rouse for defendant.

ADAMS, J. The defendant makes the point that it has an equitable claim to the insurance fund, to the extent of the indebtedness due it, by reason of the provision in its mortgage that the mortgagor would insure the buildings for its benefit; and to support this position the defendant cites *Wheeler v. Factors' and Traders' Insurance Co.*, 101 U. S. (11 Otto), 439, 25 L. Ed., 1055.

We understand the principle to be that as a rule a mortgagee has no right to the benefit of a policy taken by the mortgagor, in the absence of an agreement to this effect, unless the policy is assigned to him; but where the mortgagor is charged with the duty of taking out insurance for the benefit of the mortgagee, as between the parties to the contract the mortgagee is entitled to an equitable lien on the proceeds of the policy obtained by the mortgagor. *Wheeler v. F. & T. Ins. Co., supra; Thomas v. Von Kapff,* 6 Gill & J., 372; *Chipman v. Carroll,* 25 L. R. A., 305, and note; *Fitts v. Grocery Co.,* 144 N. C., 463. In the case last cited it is said that where the mortgagor has covenanted that he will keep the mortgaged premises insured for the benefit of the mortgagee and then effects insurance in his own name, equity will treat the insurance as effected under the agreement and will give the mortgagee his equitable lien. In this connection it may be noted that the case of *Dunlop v. Avery,* 23 Hun., 509, cited in the defendant's brief was reversed by the Court of Appeals of the State of New York. 89 N. Y. (44 Sickels), 592.

But how is the defendant's argument on this point applicable to the facts? The mortgagor agreed to carry insurance for the benefit of the defendant and he was "required" to do the same thing for the benefit of the plaintiff. That the agreement was in writing and the "requirement" in parol does not imply that the duty with which the mortgagor was charged was less solemn or exacting in the one case than in the other. *Swearingen v. Ins. Co.,* 52 S. C., 309. Furthermore, all the policies procured by the mortgagor were intended to provide and did provide for the protection of both parties; they were payable to the plaintiff and to the defendant "as interest may appear." The New York standard mortgage clause was attached to each of the policies and this clause operates as a separate insurance of the mortgagee's interest. *Bank v. Ins. Co.,* 187 N. C., 97; *Everhart v. Ins. Co.,* 194 N. C., 494; *Welch v. Ins. Co.,* 196 N. C., 546.

The defendant insists that it had an insurable interest in the property and that without regard to its right to an equitable lien it was assured as to indemnity by the New York standard mortgage clause. There can be no doubt that the defendant had such insurable interest. Joyce on Insurance (2 ed.), secs. 1036, 1037; *Ins. Co. v. Reid,* 171 N. C., 513. But there is a difference between insurance of the mortgagee's interest and insurance of the mortgagor's interest for the benefit of the mortgagee—a difference, likewise, between the mortgagor's executed and unexecuted covenant to take insurance for the protection of the mortgagee. Joyce on Insurance (2 ed.), sec. 104. In this case the relation of the parties is determinable by the executed contract, the direct question being whether the interest of the parties in the proceeds of the policies is to be adjudicated upon the basis of priority of mortgage liens or upon that of a personal contract without regard to such priority. *Batts v. Sullivan,* 182 N. C., 129, is not authority for the position that liens upon property should be disregarded, because there the policy taken out by the tenant did not purport to protect the interest of the landlord.

If neither of two mortgagees, for whom insurance has been procured, has any priority of claim or of liens, the proceeds of the policies should ordinarily be divided between the mortgagees in proportion to their respective claims; but it is otherwise if there is such priority among the claimants. 26 C. J., 449, sec. 588; *Parker v. Ross,* 11 S. W., 965; in *Lichtstern v. Forehand,* 194 N. W., 421. "The insurance money received by the mortgagee takes the place of the mortgaged property, and the mortgagee would receive it, if the debt was due and unpaid, as he would receive the mortgaged property which it represented to reasonably account for its use." Jones on Mortgages (7 ed.), sec. 410. The plaintiff's mortgage was registered 14 December, 1920; the defendant's was not executed until 11 May, 1925. By virtue of our statute priority is given to the mortgage which was first recorded. C. S., 3311. Our conclusion is that the claim of the Wayne National Bank should first be paid out of the funds derived from the policies of insurance. This conclusion finds support in C. S., 6420, which provides that where by the terms of a fire insurance policy taken out by a mortgagor loss is payable to a mortgagee for his benefit the company shall pay all mortgages in the order of their priority of claim. For this reason it is not necessary to consider the defendant's appeal.

Error.

C. L. ANDERSON, ADMINISTRATOR OF THOMAS G. ANDERSON, DECEASED, v. LIFE AND CASUALTY INSURANCE COMPANY OF TENNESSEE.

(Filed 17 April, 1929.)

1. **Insurance E b—Construction of insurance contract in general.**

   The rule that a liberal construction of ambiguous language will be given in favor of the insured has no application when the words employed clearly express the terms upon which the policy has been issued.

2. **Insurance R a—Construction of policy of accident insurance as to risks covered.**

   Where a policy of accident insurance indemnifies first against injury to the insured while a pedestrian in connection with being struck down by certain classes of motor-driven vehicles, and second, against accident from a collision while riding in certain classes of motor-driven cars, the qualifying terms of each class will be applied to the risks of its particular class, and will not be construed together so as to make the risks of one class of such vehicles or cars apply to an injury covered by the other.

3. Same—Motorcycles.

A policy insuring a person against accident by collision while riding or driving in any horse-drawn vehicle or motor-driven car by interpretation clearly excludes an accident occurring while the insured was riding on a motorcycle, a car by usual significance being an automobile, affording greater security to the one riding therein than a motorcycle.

4. Same.

A motorcycle is a motor vehicle designed to travel on not more than three wheels in contact with the ground as distinguished from a motor car which has four wheels, and a body within which a person rides, affording greater safety.

APPEAL by plaintiff from *Lyon, Emergency Judge,* at September Term, 1928, of FORSYTH. Affirmed.

On 14 September, 1926, the defendant issued to the plaintiff's intestate a "Travel and Pedestrian Policy." The insuring clauses limit the extent of the insurance as follows:

"Life and Casualty Insurance Company, of Tennessee, hereby insures the person named in said schedule against the result of bodily injuries received during the time this policy is in force, and effected solely by external violent and accidental means strictly in the manner hereafter stated, subject to all the provisions and limitations hereinafter contained, as follows: If the insured be struck or knocked down or run over while walking or standing on a public highway by a vehicle propelled by steam, cable, electricity, naphtha, gasoline, horse, compressed air, or liquid power, excluding injuries sustained while on a railroad right of way in violation of any statute or of any regulation of the railroad company, or if the insured shall, by the collision of or by any accident to any railroad passenger car or passenger steamship or steamboat, in or on which such insured is traveling as a fare-paying passenger; or, by the collision of or by any accident to any public omnibus, street railway car, taxicab, or automobile stage, which is being driven or operated, at the time, by a licensed driver plying for public hire, and in which such insured is traveling as a fare-paying passenger; or, by the wrecking of a passenger elevator in which the insured is riding as a passenger; or, by the collision of or by any accident to any private horse-drawn vehicle, or motor-driven car in which insured is riding or driving; or, if the insured shall, by being accidentally thrown from any such vehicle or car, suffer any of the specific losses set forth below, the company will pay the sum set opposite such loss." The case was tried in the Forsyth County Court and judgment of nonsuit was rendered, and on appeal to the Superior Court the judgment of the county court was affirmed.

J. M. Wells, Jr., and John C. Wallace for plaintiff.
Manly, Hendren & Womble for defendant.

ADAMS, J. The insured was a motorcycle officer in the police department of the city of Winston-Salem, and on 11 August, 1927, while riding on his motorcycle he was injured by its collision with a truck. The injuries he received caused his death on 15 August, 1927. The motorcycle was the ordinary two-wheel machine propelled by gasoline. The question for decision is whether a motorcycle is within the clause, "motor-driven car in which insured is riding or driving."

The appellant contends that the words "any such vehicle or car," near the end of the last insuring clause, embrace all the vehicles described in the clause relating to pedestrians. This instruction, we think, is not permissible. There are two classes of persons for whose benefit the policy was intended: pedestrians, or persons "walking or standing on a public highway," and travelers riding or driving in specified vehicles or cars. These two classes are clearly defined. The intestate was insured against the result of bodily injuries caused, while he was walking or standing on a public highway, by being struck or knocked down, or run over by a vehicle propelled by steam, cable, electricity, naphtha, gasoline, horse, compressed air or liquid power. Persons driving or riding in motor-driven cars are not included in this category. The bodily injuries against which they are insured are injuries caused them in the manner described while they are driving or riding a vehicle used in ordinary travel. As the two classes are separate and distinct, the phrase "any such vehicle or car," which clearly refers to vehicles and cars of the latter class, cannot reasonably be said to include the vehicles described in the former class. *Noscitur a sociis*—the meaning of a doubtful word may be ascertained by reference to the meaning of words associated with it.

Is a motorcycle a motor-driven car? The question, on which we have no direct decision, has been determined by other courts adversely to the contention of the appellant. The clause under consideration—"motor-driven car in which the insured is riding or driving"—was construed by the Court of Errors and Appeals of New Jersey in *Perry v. North American Acc. Ins. Co.*, 138 At., 894. There it was said: "Our examination of the provision of the policy sued on bearing on the present controversy has led us to the conclusion that the correct interpretation of the terms of the policy excludes a motorcycle from the class of a motor-driven car. There is no ambiguity in the language of the policy. The principle of law that when an ambiguity exists the policy should be liberally construed against the company and in favor of the insured has no application. The ordinary and usual meaning of the words must be sought and given to them. Where the words are used to express the meaning of the party using them, the court will not adopt a strained and improbable construction. *Bew v. Traveler's Insurance Co.*, 95 N. J.

Law, 533, 112 A. 859, 14 A. L. R., 983. The policy uses the phrases "horse-drawn vehicles" and "motor-driven cars." A motorcycle is a vehicle. If motorcycles were intended to be included, the draftsman of the policy would have used the words "motor-driven vehicles." After using the word "vehicle" in the phrase "horse-drawn vehicles," it would seem that the use of the phrase "motor-driven car" immediately afterward is significant and indicates a purpose to exclude such a vehicle as a motorcycle from the provisions of the policy. One riding on a motorcycle is more exposed to accidents than one riding in a motor-driven car. A car stands upright on four wheels whether in operation or stopped. It is protected by bumpers in front and rear. It has a body in which the passengers sit which protects them in some measure from the perils of the highway. One riding on a motorcycle cannot keep it in equilibrium when not in operation. When stopped he must get off or place his feet, or one foot, upon the ground. A motorcycle has no front or rear protection in the form of fenders or bumpers. It has no body for the protection of the rider. A rider is therefore more exposed to the dangers incident to congested traffic. For these reasons, which make the risk of riding on a motorcycle greater than that of riding in a motor-driven car, we think the rider on a motorcycle was intentionally excluded from the provisions of the policy by the use of the language employed. The use of the preposition "in," in the clause of the policy reading "or motor-driven car in which insured is riding or driving" is also significant. One riding on a motorcycle is not referred to as riding "in" a motorcycle, but "on" a motorcycle. A passenger or one driving a car is not usually referred to as riding "on" a car but "in" a car. Where a policy uses the words "or motor-driven car in which the insured is riding or driving," it is for the purpose of limiting the insurer's liability. The reason is the one we have indicated, the greater safety of the insured "in" a car. This distinction has been recognized in a number of cases."

In *Salo v. North American Acc. Ins. Co.*, 153 N. E., 557, the Supreme Judicial Court of Massachusetts observed: "The word 'car' is ordinarily used in speaking of an automobile. It is a common expression describing an automobile. It is a matter of common knowledge that in ordinary conversation a motorcycle is not referred to as a car, but is spoken of as a motorcycle. The difference in the mechanical construction of automobiles and motorcycles does not indicate that a common designation would naturally apply to both. A motorcycle having ordinarily two wheels is a machine more in the nature of a bicycle equipped with motor power."

The same result, based upon similar reasoning, was announced by the Louisiana Supreme Court in *LaPorte v. North American Acc. Ins. Co.*, 161 La., 933, 48 A. L. R., 1096.

Our statute defines motorcycle as a motor vehicle designed to travel on not more than three wheels in contact with the ground except any such vehicle as may be included in the term "tractor," as defined in the same statute. P. L. 1927, ch. 148, sec. 1(c). There is nothing in our law which is inconsistent with the cited authorities, and we see no reason why they should not be regarded as conclusive on the question here presented. The judgment is

Affirmed.

JOE HARRISON AND WIFE, HETTIE HARRISON, v. D. M. SLUDER.

(Filed 17 April, 1929.)

Contracts E a—Action of defendant held not a breach of contract for board during his life.

Where there is a contract to furnish the defendant board and lodging during his life in consideration of his willing all his property to the plaintiffs, the defendant does not breach his contract by merely leaving the plaintiffs' house without objecting to the board and lodging, which the plaintiffs are ready, able, and willing to furnish, and residing elsewhere, and the plaintiffs may not maintain an action for the amount of the board and lodging to the date of his so leaving without showing that the defendant has breached the same by refusing to comply with its terms.

APPEAL by plaintiffs from judgment of Superior Court of GUILFORD, *Moore, J.* Affirmed.

This action was begun and tried in the municipal court of the city of High Point, before Teague, J., and a jury.

From judgment of said court dismissing the action, plaintiffs appealed to the Superior Court of Guilford County. The only assignment of error on said appeal was based on plaintiffs' exception to the judgment which was rendered upon defendant's motion at the close of all the evidence.

From the judgment of the Superior Court, refusing to sustain plaintiffs' assignment of error, and affirming the judgment of the municipal court, plaintiffs appealed to the Supreme Court.

D. C. MacRae and R. T. Pickens for plaintiffs.
Z. I. Walser for defendant.

CONNOR, J. This is an action to recover the value of board and lodging furnished by plaintiffs to defendant, under a special contract, entered into by and between plaintiffs and defendant, on or about 20 March, 1925. The contract is admitted in the pleadings. There is no controversy between the parties as to its essential terms.

Plaintiffs agreed to board and lodge the defendant, in their home in the town of Thomasville, N. C., so long as he should live, and defendant, in consideration of said agreement, agreed to execute his last will and testament and thereby devise and bequeath to plaintiffs all his property, both real and personal, to the end that plaintiffs should have said property at defendant's death.

Pursuant to the terms of said contract, defendant entered the home of plaintiffs on or about 20 March, 1925, and lived in said home continuously, except when absent on occasional visits, from said date to 10 October, 1927. During this time plaintiffs, under the terms of their contract with defendant, furnished to him board and lodging in their home. Defendant accepted said board and lodging without complaint. On 14 March, 1925, defendant signed and duly executed a paper-writing which is in form sufficient to constitute his last will and testament; he thereby devised and bequeathed to plaintiffs all his property, both real and personal. Defendant delivered said paper-writing to the person named therein as executor of said last will and testament; said paper-writing has not been altered, revoked or canceled, but is now in the possession of the person to whom it was delivered by defendant. From the date on which plaintiffs and defendant entered into said contract, to wit, 20 March, 1925, to 10 October, 1927, both parties to said contract complied in all respects with its terms.

On 10 October, 1927, defendant left plaintiffs' home; from said date to the date of the commencement of this action, to wit, 11 February, 1928, defendant boarded and lodged elsewhere than at the home of plaintiffs. When defendant left the home of plaintiffs, and procured board and lodging elsewhere, he made no complaint of the board and lodging furnished to him by plaintiffs in their home. The only reason defendant gave for leaving plaintiffs' home was that he did not like to live in town, and wished to live in the country. Prior to 10 October, 1927, defendant had frequently left plaintiffs' home for visits, after which he returned to said home and resumed his relations with plaintiffs. There was no evidence tending to show that plaintiffs objected to defendant leaving their home, or that they have at any time requested him to return; nor was there evidence tending to show that defendant, since leaving plaintiffs' home on 10 October, 1927, has made any demand or request of plaintiffs with respect to his board and lodging. Defendant has simply left plaintiffs' home, without complaint as to the manner in which plaintiffs had complied or were complying with the terms of their contract; there was no evidence tending to show whether or not defendant intends to return to plaintiffs' home, and to resume his relations to plaintiffs under the contract.

The only question presented for decision is whether there was any evidence from which the jury could have found that defendant had breached or abandoned his contract with plaintiffs, and thereby subjected himself to this action for the recovery of the value of the board and lodging furnished by plaintiffs to him, prior to 10 October, 1927, in part performance by them of their contract with defendant.

We concur with the judge of the Superior Court in his decision that there was no error in the judgment of the municipal court, dismissing the action for that there was no evidence at the trial tending to show that defendant had breached the contract, or that the contract had been abandoned by either party thereto.

Plaintiffs rely upon *Hayman v. Davis,* 182 N. C., 563, 109 S. E., 554, as sustaining their assignment of error. In that case, defendant by his demurrer, admitted that the contract by which he had agreed to give his land to plaintiff, had been abandoned. It was, therefore, held that, upon the allegations of the complaint, plaintiff could recover, before the death of defendant, on a *quantum meruit* for the services she had performed prior to defendant's breach and abandonment of the contract. In the instant case, defendant denies that he has breached the contract, or that the contract has been abandoned by either party thereto; he alleges in his answer that the contract is still subsisting, and is in full force. There was no evidence to sustain the allegation in the complaint that defendant had breached the contract, or that the contract had been abandoned. The failure of defendant to remain in plaintiffs' home continuously, and to accept there the board and lodging which plaintiffs are ready, willing and able to furnish, in accordance with their contract, does not relieve defendant of his obligation, under the contract; so long as plaintiffs are ready, willing and able to comply with the contract on their part, defendant is and will be bound by its terms. It is elementary that plaintiffs cannot maintain an action on the contract, until and unless defendant has in some way breached it. Defendant did not agree to remain continuously in plaintiffs' home, so long as he shall live; if he chooses to leave said home from time to time, of his own accord, and to procure board and lodging elsewhere, he does not thereby breach his contract to execute his last will and testament, devising and bequeathing all his property to plaintiffs, in consideration of board and lodging furnished to him by plaintiffs, or of board and lodging which plaintiffs are ready, willing and able to furnish to him, at his request in their home.

In the absence of evidence showing a breach of the contract by defendant, amounting to an abandonment of the contract, acquiesced in by plaintiffs, plaintiffs cannot recover of defendant, during his lifetime, on a *quantum meruit,* for board and lodging furnished to him, under the contract. If defendant shall fail to devise and bequeath his property to plaintiffs, by his last will and testament, he will thereby breach his contract, and plaintiffs can then recover damages caused by such breach, upon showing that they have fully performed the contract, on their part, by furnishing board and lodging to defendant so long as he lived; they cannot then be defeated of their recovery by a showing that defendant did not remain continuously in their home, and there accept board and lodging which plaintiffs were at all times ready, willing and able to furnish in performance of their contract. We find no error in the judgment of the Superior Court. It is

Affirmed.

W. F. MORRISON v. W. C. LEWIS AND GROVER THOMPSON.

(Filed 17 April, 1929.)

Abatement and Revival B b—Action is pending from issuance of summons—Pleadings.

An action is pending in the Superior Court from the time the clerk issues the summons for service by the proper process officer, and where the action has not abated by failure to complete service as the law requires, another action later begun, involving the same subject-matter between the same parties, will be dismissed when this is properly made to appear. C. S., 475.

APPEAL by plaintiff from *Shaw, J.,* at November Term, 1928, of GUILFORD.

Civil action to recover damages for an alleged negligent injury resulting from a collision between plaintiff's automobile, driven by himself, and a truck, owned by the defendant, W. C. Lewis, and operated at the time by his employee, Grover Thompson.

On motion of the defendant, W. C. Lewis, there was a judgment dismissing the action as to him for that another suit between the same parties, involving the same subject-matter, was pending in Surry County; and on motion of defendant, Grover Thompson, the action against him was removed to Surry County for trial for the convenience of witnesses and to promote the ends of justice.

Plaintiff appeals, assigning error.

King, Sapp & King for plaintiff.
J. F. Hendren and Wm. M. Allen for defendants.

STACY, C. J. The collision between plaintiff's automobile and defendant's truck occurred on 23 September, 1927. Suit for damages arising out of said collision was instituted in Surry County by W. C. Lewis against W. F. Morrison 14 November, 1927, summons being signed by the clerk on that day, delivered immediately to plaintiff's attorney for delivery to the sheriff who received it 22 November and duly served same 28 November thereafter. The present suit of W. F. Morrison against W. C. Lewis and Grover Thompson for damages arising out of the same collision was instituted in Guilford County 21 November, 1927, summons being delivered to the sheriff 22 November and duly served 25 November thereafter.

The appeal presents the single question as to whether the suit of Lewis *v.* Morrison was pending in Surry County at the time of the institution of the present action in Guilford County. The trial court held that it was, as summons had been "issued" therein 14 November, 1927, and we are disposed to concur in this ruling.

The rationale of our decisions on the subject seems to be that when a summons passes out of the hands of the clerk for service, whether delivered directly to the sheriff or to another for him, and is duly served on or before the day fixed for its return, nothing else appearing, the action is regarded as pending from the time the summons left the clerk's office, under his sanction and authority, for the purpose of being served. *McClure v. Fellows,* 131 N. C., 509, 42 S. E., 951 (overruled on another point in *Grocery Co. v. Bag Co.,* 142 N. C., 174, 55 S. E., 90, and *Jenette v. Hovey,* 182 N. C., 30, 108 S. E., 301); *Houston v. Thornton,* 122 N. C., 365, 29 S. E., 827; *Currie v. Hawkins,* 118 N. C., 593, 24 S. E., 476; *Webster v. Sharpe,* 116 N. C., 466, 21 S. E., 912; *Pettigrew v. McCoin,* 165 N. C., 472, 81 S. E., 701; *Construction Co. v. Ice Co.,* 190 N. C., 580, 130 S. E., 165.

It is provided by C. S., 475, that "civil actions shall be commenced by issuing a summons," and, as a general rule, a summons is said to be "issued" when it passes from the clerk's office, or the office of a justice of the peace, under the sanction and authority of such officer, for the purpose of being served. Of course, if the summons be not served on or before the day fixed for its return, and no alias is sued out or ordered, a discontinuance of the action results therefrom. *Neely v. Minus,* 196 N. C., 345. And if a discontinuance be worked by failure to serve the summons by the return date, and not until that time, it would seem to follow that the action was pending from the time the summons left the clerk's hands for the purpose of being served. *Pettigrew v. McCoin, supra.*

The decision in *Smith v. Lumber Co.,* 142 N. C., 26, 54 S. E., 788, is not at variance with this position, but in support of it, for in that case—

the question of only one day being involved—the summons did not leave the hands of the justice of the peace who signed it until the day following its date.

The motion to dismiss the present action as against the defendant, W. C. Lewis, was properly allowed. *Allen v. Salley,* 179 N. C., 147, 101 S. E., 545.

In *Alexander v. Norwood,* 118 N. C., 381, 24 S. E., 119, it was said: "Where an action is instituted, and it appears to the court by plea, answer or demurrer, that there is another action pending between the same parties and substantially on the same subject-matter, and that all the material questions and rights can be determined therein, such action will be dismissed."

On authority of the cases cited, the judgment will be upheld.

Affirmed.

C. M. CECIL, TRUSTEE, AND N. C. LOWE v. SNOW LUMBER COMPANY.

(Filed 17 April, 1929.)

Appeal and Error F a—Assignment of errors under Rules of Court.

Where exceptions and assignments of error in a special municipal court are overruled upon appeal to the Superior Court, and are again relied on in an appeal to the Supreme Court, they must be sufficiently definite to enable the Supreme Court to understand what questions are sought to be presented without a voyage of discovery through the record, Rule 19, sec. 3, and otherwise the appeal will be dismissed on the appellee's motion.

APPEAL by defendant from *Shaw, J.,* at December Term, 1928, of GUILFORD.

Civil action to recover funds alleged to have been deposited in the Commercial National Bank of High Point by C. M. Cecil, trustee, and seized under execution by the Snow Lumber Company.

The case was tried in the municipal court of the city of High Point, the court of first instance, where findings were made in favor of the plaintiffs and judgment entered thereon. On appeal to the Superior Court of Guilford County, these findings were approved and the judgment of the municipal court affirmed.

The defendant appeals, assigning error as follows:

"The errors heretofore assigned in the Superior Court are hereby assigned in the Supreme Court, and as same were duly grouped in the Superior Court, appellant does not deem it necessary to restate and group same."

The assignments of errors in the Superior Court were as follows:

"On appeal to the Superior Court, the defendant hereunder groups its exceptions and respectfully assigns in error the actions of the court as set out in its respective exceptions and assignments of error, as follows: Exception No. 6 (R., p. 38). Refusal of court to make the finding of facts, to draw the conclusions of law and to sign the judgment as tendered by the defendant, as set out in the record.

"Exception No. 7 (R., p. 38). The signing of the judgment as set out in the record."

Looking back into the record, it appears that the "special verdict, conclusions of law and judgment" tendered by the defendant, the subject of the sixth exception, covers more than eight pages of the record, and the judgment signed, the subject of the seventh exception, covers approximately five pages. The exceptions are not specific.

C. C. Barnhart, Robinson, Haworth & Reese and Z. I. Walser for plaintiffs.

Peacock & Dalton and Austin & Turner for defendant.

STACY, C. J. The municipal court of the city of High Point was created as a "special court for the trial of petit misdemeanors" by chapter 569, Public-Local Laws 1913. It was given civil jurisdiction in certain cases by chapter 699, Public-Local Laws 1927, with the right of either the plaintiff or the defendant in civil actions or the defendant in any criminal action and the State in certain criminal prosecutions to appeal to the Superior Court of Guilford County in term time "for errors assigned in matters of law in the same manner and under the same requirements as are now provided by law for appeals from the Superior Court to the Supreme Court," etc. This means that in hearing cases on appeal from the municipal court of the city of High Point, the Superior Court of Guilford County sits as an appellate court, subject to review by the Supreme Court.

The assignments of error, appearing on the present record, are not sufficiently definite to enable the court to understand what questions are sought to be presented, without a voyage of discovery through the record. *Sturtevant v. Cotton Mills,* 171 N. C., 119, 87 S. E., 992. Hence, the motion of plaintiffs to dismiss the appeal and to affirm the judgment for failure to comply with Rule 19, sec. 3, would seem to be well founded. *Porter v. Lumber Co.,* 164 N. C., 396, 80 S. E., 443.

We have examined the record, however, and find no reversible error. *Thresher Co. v. Thomas,* 170 N. C., 680, 87 S. E., 327.

Appeal dismissed.

W. B. WHITAKER, SR., v. CARPENTER MOTOR CAR COMPANY ET AL.

(Filed 17 April, 1929.)

1. **Highways B c—Violation of speed law negligence per se.**
   The operating of an automobile upon a public highway or street at a speed in excess of the limit fixed by law is negligence *per se.*

2. **Same—Negligence must be proximate cause to be actionable.**
   Negligence in exceeding the legal speed limit on a public highway or street is insufficient for a recovery of damages unless there is a causal connection between the breach of duty imposed by law and the injury complained of.

CIVIL ACTION, before *Sinclair, J.,* at February Term, 1929, of DURHAM.

The plaintiff instituted an action against defendants for damages, alleging that, while he was attempting to cross East Main Street in the city of Durham, on the night of 1 October, 1926, he was negligently struck and injured by an automobile owned by the defendant, Carpenter Motor Car Company, and operated by a young man named Ross, who was the alleged agent of said company.

There was evidence tending to show that the plaintiff was struck at a point in the business section of the city, and there was further evidence tending to show that the automobile was being operated at a speed in excess of the limit prescribed by law.

The usual issues of negligence, contributory negligence and damages were submitted to the jury. The issue of negligence was answered in the negative. Whereupon judgment was entered that the plaintiff take nothing, from which judgment the plaintiff appealed, assigning error.

McLendon & Hedrick and W. Brantley Womble for plaintiff.
Brawley & Gantt for defendant, Ross.
Fuller, Reade & Fuller for Carpenter Motor Car Company.

BROGDEN, J. The trial judge instructed the jury as follows: "Now, gentlemen of the jury, the fact that a man may drive in excess of the legal rate of speed is not in itself negligence. A man may drive in excess of the legal rate of speed, and at the same time may not be guilty of negligence at all. He may be a careful and competent driver, and he may exceed the speed limit and he may not be driving recklessly and carelessly, and that would not constitute negligence in itself. The law says, however, when you have other evidence of negligence, that you may consider that as a circumstance just as you would consider any other circumstance bearing upon the main question, of whether or not a man was negligent, and consider it in that respect—but that isn't negligence in itself, that fact standing alone. The plaintiff contends you ought to find that the negligence of Ross caused the injury, and contends that there was no other car upon the street, and that was the only way it could have happened."

The foregoing instruction was erroneous. It was clearly and manifestly a legal mishap which inadvertently slipped into the day's work.

The breach of a statute enacted for the protection of the public is negligence *per se;* but notwithstanding, there must be a causal connection between the breach of the statute and the injury complained of, *Ledbetter v. English,* 166 N. C., 125, 81 S. E., 1066; *Davis v. Long,* 189 N. C., 129, 126 S. E., 521; *Gillis v. Transit Corp.,* 193 N. C., 346, 137 S. E., 153; *Peters v. Tea Co.,* 194 N. C., 172, 138 S. E., 595; *Goss v. Williams,* 196 N. C., 213.

New trial.

GUY D. GRIMES v. CHAS. W. FULTON, AND GUY D. GRIMES v. CHAS. W. FULTON AND J. M. FULTON.

(Filed 17 April, 1929.)

Appeal and Error J b—Power of removal for convenience of witness is within discretion of court and not reviewable.

A motion for the removal of a cause from one county to another for convenience of witnesses and to promote the ends of justice is addressed to the sound discretion of the Superior Court judge, and is not subject to review in the Supreme Court except upon abuse of this discretion, C. S., 470. As to whether a city court has the right to remove a cause for this reason to a Superior Court of a different county is not presented by the record on this appeal.

APPEAL by defendant, Charles W. Fulton, from *Shaw, J.,* at December Term, 1928, of GUILFORD.

Motion by the defendant, Charles W. Fulton, to remove these actions for slander and slander of title from "the municipal court of the city of High Point," where they were instituted, to the Superior Court of Surry County for trial on the grounds of convenience of witnesses and to promote the ends of justice, which motion was denied in the court of first instance and judgment affirmed on appeal to the Superior Court of Guilford County.

From the order of the Superior Court affirming the judgment of the municipal court the said defendant appeals, assigning errors.

King, Sapp & King, Gold & York and Roberson, Haworth & Reese for plaintiff.

Folger & Folger and Carter & Carter for defendant, C. W. Fulton.

STACY, C. J. It is not conceded that the judge of "the municipal court of the city of High Point" has the power to remove a cause from said municipal court to the Superior Court of a county other than Guilford for trial, but even if it were (which question is not presented and therefore not decided), still the motion to remove, on the grounds stated, "for the convenience of witnesses and to promote the ends of justice," C. S., 470, rests in the sound discretion of the trial court, and is not reviewable on appeal in the absence of abuse of such discretion. *Power Co. v. Klutz,* 196 N. C., 358, and cases cited.

Affirmed.

TOWN OF KENILWORTH ET AL. v. SOLON HYDER, TAX COLLECTOR FOR BUNCOMBE COUNTY.

(Filed 17 April, 1929.)

1. **Drainage Districts A a—Statutes creating drainage district construed in pari materia.**

Where proceedings for the establishing of a special taxing drainage district are referred to in a later statute and confirmed therein with an additional provision establishing its boundaries, the two being interrelated, are to be construed together by the courts when the constitutionality of the district is questioned.

2. **Same—Notice to or consent of those included in district not necessary.**

Where an incorporated town having a sewerage system is included in a special drainage district later established by statute giving defined boundaries overlapping those of the town, it is not required that those owning land within the lappage should be notified or give their consent to be also included within the boundaries of the special district.

3. **Drainage Districts A b—Boundaries of district need not coincide with political subdivisions.**

The General Assembly of North Carolina has the power to create drainage districts without regard to the boundaries of the other political subdivisions of the State, such as county or municipal boundaries and the like.

4. **Same—Provision that town owning sewerage system cannot be made a part of district without consent relates to sewerage system and not to boundaries.**

Where a statute creating a special drainage district includes in its expressed boundaries an incorporated town already having a drainage system, a proviso therein that no person, firm or corporation owning any water system shall be compelled to become a part of such sanitary district unless satisfactory, etc.: *Held,* the word "district" used in the proviso means "district system" and not the boundaries of the area, and does not operate to relieve those living in such section from the drainage assessments.

5. **Drainage Districts B a—Notice and an opportunity to be heard not necessary to validity of special taxes for district.**

A statute which authorizes the laying off of a drainage district with power given the trustees provided therein to lay an *ad valorem* tax for its construction and maintenance is not unconstitutional for failing to provide that notice be given the owners of land situate therein that the lands will be included within the area or of the amount of the taxes to be levied or the specific purpose therefor.

6. **Same—Special tax for drainage district does not require submission to voters nor is its creation private act.**

A statute creating and designating the boundaries of a drainage district and providing taxation for its construction and maintenance is for a necessary purpose and does not fall within the purview of the State Constitution, Art. VII, sec. 7, requiring its submission to the voters within the district, nor is it a local, private or special act relating to health or sanitation inhibited by our Constitution, Art II, sec. 29.

7. **Same—Assessing special drainage tax not an exercise of Eminent Domain—Due Process Clause.**

The creation by statute of a special drainage district with the power to levy an *ad valorem* tax therein for its construction and maintenance is not a taking of property within the purview of our Constitution, Art. I, sec. 17, and does not fall within the intent and meaning of the due process clause, Federal Constitution, Art. XIV, sec. 1. The distinction between taxation of this character and assessments pointed out by ADAMS, J.

8. **Same—Double taxation not grounds for attacking drainage assessments.**

Where some of the citizens of an incorporated town having a sewerage system therein have their property also included in a special taxing drainage district defined and created by statute, the constitutionality of the later act may not be successfully questioned on the grounds either of double taxation or a taxation without benefit received.

APPEAL by plaintiffs from *Schenck, J.,* at February Term, 1929, of BUNCOMBE. Affirmed.

This is an action to restrain the defendant from collecting an *ad valorem* tax said to have been levied in the Swannanoa Water and Sewer District. At the session of 1923 the General Assembly passed an act to create sanitary districts in Buncombe County and authorized the county commissioners to create such districts upon petition of the voters residing in the proposed districts. Public-Local Laws 1923, ch. 341. This act was ratified 1 March, 1923, and under it the board of commissioners established sanitary districts, one of which was the Swannanoa Sanitary Sewer District. In 1927 the General Assembly ratified and approved the incorporation of the last named district and changed its name to the Swannanoa Water and Sewer District. The boundaries of the district are prescribed and the machinery for its operation is fully set forth in the act.

In their complaint the plaintiffs allege that the town of Kenilworth is a municipal corporation and that the other plaintiffs are residents of the town and owners of property therein which is subject to an *ad valorem* tax; that the town has miles of paved streets, modern conveniences including a complete water and sewer system, and property valued at almost four million dollars; that the defendant has demanded of the plaintiffs the payment of a tax of fifty-four cents on property valued at $100; that the system of the Swannanoa Water and Sewer District is not connected with the town system and is of no benefit to the town; that the plaintiffs have never consented to become a part of the Swannanoa District; and that the act of 1927, *supra,* was enacted in breach of the Fourteenth Amendment to the Constitution of the United States and section 17 of the Bill of Rights, and of Article VII, section 7, and Article II, section 29, of the Constitution of North Carolina.

The defendant demurred to the complaint on the following grounds: (a) Said complaint fails to state that the territory of the plaintiff, the town of Kenilworth, and the lands of the other plaintiffs, are situated outside of the boundaries of the Swannanoa Water and Sewer District, as the same is confirmed, created, and delimited by the terms and provisions of the statute pleaded in the 9th and 12th paragraphs of said complaint, namely, chapter 249, Public-Local Laws 1927, aforementioned; (b) because said complaint fails to allege that the tax levy which the plaintiffs resist and seek to invalidate in this action is made for any other purpose than to pay the principal and interest of bonds issued and caused to be issued and sold by said Swannanoa Water and Sewer District and/or by the county commissioners of Buncombe County for the purpose defined by the aforesaid Public-Local Law, or that said levy exceeds the rate and amount necessary for said purpose; and generally (c) because said complaint fails to state any cause of action, either legal or equitable, which would or might entitle the plaintiffs to the relief demanded in said complaint."

The demurrer was sustained and the action dismissed. The plaintiff excepted and appealed for error assigned.

J. W. Pless for plaintiffs.

Frank Carter, Edwin S. Hartshorn, Thos. S. Rollins and S. W. Brown for defendant.

ADAMS, J. The plaintiffs allege that the tax complained of was levied under Public-Local Laws 1927, ch. 249, and upon this allegation they base the contention that in determining the controversy we are restricted to a consideration of this act—a contention, however, in which we do not concur. They assail the whole chapter as unconstitutional, but allege that if it is valid they are not within its purview. Their allegations in effect make the act a part of the complaint and call for an examination of all its relevant provisions.

The first and second sections authorize, ratify, approve, and confirm all the proceedings taken by the board of commissioners of Buncombe County creating the Swannanoa Sanitary Sewer District under chapter 341, Public-Local Laws 1923, declare the district to be a municipal corporation with perpetual existence, and change its name to that of the "Swannanoa Water and Sewer District." If the board of county commissioners derived its power from the act of 1923, we must refer to this act to ascertain whether the board transgressed its delegated powers and whether the proceedings which the act of 1927 purports to have ratified were effective or invalid. The two acts were enacted for a common purpose and are essentially interrelated.

Before going to the demurrer we advert to the grounds on which the plaintiffs criticize the act of 1927. Pursuant to a rule of practice in this Court (R. 27½) the appellants in their brief submit the following as the questions involved in the appeal: (1) Whether the provisos in section 11 of the act of 1927 exclude the plaintiffs from the operation of the act until they consent to become a part of the sanitary district; (2) whether the act of 1927 is in conflict with the Constitution, Article II, section 29, or (3) with Article VII, section 7; (4) whether it violates the seventeenth section of the Declaration of Rights or the due process clause of the Fourteenth Amendment to the Federal Constitution. If these questions, which are the only ones proposed, are resolved against the appellants, the specific grounds of the demurrer will demand only brief consideration.

In view of some recent decisions by this Court it may be expedient first to dispose of the second and third questions. The act of 1923 authorized the county commissioners to create sanitary districts in Buncombe County and to appoint for each district three trustees who were to exercise certain legislative powers: to build a system of sewerage and sewer pipes, to purchase or condemn land, and to issue negotiable coupon bonds of the district. Upon its creation each sanitary district was made a municipal corporation, and the county commissioners were authorized annually to levy a special tax upon all the taxable property within the district sufficient to pay the interest as it accrues and to create a sinking fund for the payment of the principal at maturity.

Section 10 of the act of 1927 authorizes the commissioners annually to levy a special tax of "sufficient rate and amount to pay the principal and interest of any bonds authorized by this act as the same become due, the tax to be levied against all the taxable property within said district"; also to levy a special tax sufficient in rate and amount for the proper maintenance, extension, supervision, and control of the authorized improvements. It may be seen that in their salient features the two acts are strikingly similar—the chief divergence of the latter being a description of the district by metes and bounds which could not be set forth in the former, the provision for taking over any other water or sewerage system with the provisos which the appellants invoke, and a direction that on completion of the work the trustees surrender to the county all property belonging to the district.

The following sections are the basis of the second and third questions: "No county, city, town or other municipal corporation shall contract any debt, pledge its faith or loan its credit, nor shall any tax be levied or collected by an officer of the same except for the necessary expenses thereof unless by a vote of the majority of the qualified voters therein." Constitution, Art. VII, sec. 7.

"The General Assembly shall not pass any local, private, or special act or resolution . . . relating to health, sanitation, and the abatement of nuisances." Constitution, Art. II, sec. 29.

In *Reed v. Engineering Co.,* 188 N. C., 39, it was held that the act of 1893 is not antagonistic to either of these constitutional inhibitions; that a water and sewerage system involves a necessary expense and that the act is not a local, private, or special act relating to health or sanitation. As already indicated the two legislative acts are correlative; they were enacted to achieve a single result; and the divergence between them is so slight that we see no convincing reason for holding that *Reed's case* is not equally applicable to the later act. See *Kornegay v. Goldsboro,* 180 N. C., 441; *Coble v. Comrs.,* 184 N. C., 342; *Harrington v. Comrs.,* 189 N. C., 572, 576. Compare *Armstrong v. Comrs.,* 185 N. C., 405; *Day v. Comrs.,* 191 N. C., 780; *Sanitary District v. Prudden,* 195 N. C., 722.

We turn now to the fourth question. "No person ought to be . . . disseized of his freehold, liberties, or privileges . . . or in any manner deprived of his life, liberty, or property, but by the law of the land." Constitution, Art. I, sec. 17. "Nor shall any state deprive any person of life, liberty, or property, without due process of law." Constitution of United States, Art. XIV, sec. 1.

Does the act of 1927 violate these provisions? The appellants say that they had no notice of the proposed boundaries before the district was formed and that they have not been benefited in any way by its creation.

It may first be noted that this act does not levy special taxes or assessments upon abutting property for special benefits conferred by a public improvement. "Assessments as distinguished from other kinds of taxation are those special and local impositions upon the property in the immediate vicinity of municipal improvements which are necessary to pay for the improvement, and are laid with reference to the special benefit which the property is supposed to have derived therefrom. Provisions relating to taxation generally are uniformly held not applicable to local assessments or special taxation for improvements." **McQuillin on Municipal Corporations (2 ed.), sec. 2565.**

Not without significance is the omission from the act of 1927 of a provision in the act of 1923 permitting an election by the trustees between constructing the sewer system at the expense of the district and constructing it by an assessment against the property abutting the system or within a radius of the benefits arising from the improvement, leaving only the first named method operative. Both acts provide for the condemnation of land, but the law authorizing assessments against abutting property for the payment of public improvements has no relation to the exercise of the power of eminent domain. McQuillin, *supra.*

The district in question is a special taxing district. The power of the Legislature to form such districts is fully recognized and is practically unlimited. *Kelly v. Pittsburgh*, 104 U. S., 54, 26 L. Ed., 658; *Myles Salt Co. v. Bd. of Comrs.*, 239 U. S., 478, 60 L. Ed., 392. "Sometimes it is deemed wise to create a tax district for special purposes, generally for public improvements, such as for highway taxes, bridge taxes, drainage taxes, or the like, and to fix the boundaries of such district as including two or more counties or towns or even making the district wholly independent of such political boundaries." . . . "Taxing districts may be as numerous as the purposes for which taxes are levied. Equality and uniformity of taxation does not preclude the power of the state to create separate taxing districts, provided the taxes are equal and uniform within each taxing district." Cooley on Taxation, secs. 319, 321. The same writer says: "It is not essential that the political subdivisions of the state shall be the same as the taxing districts, but special districts may be established for special purposes, wholly ignoring the lines of the political subdivisions of the state. It is compulsory that the boundaries of the political divisions of the state shall be regarded in taxation only where the tax itself is for a purpose specially pertaining to one of them in its political capacity, so that the nature of the tax will determine the district. A school district may be created out of territory taken from two or more townships or counties, and the benefits of a highway, a levee, or a drain may be so peculiar that justice would require the cost to be levied either upon part of a township or county, or upon parts of several such subdivisions of the state." *Ibid.*, sec. 325. And more specifically as to due process of law: "Property taken in the lawful exercise of the taxing power is not taken without due process of law. In the exercise of the taxing power, due process does not require that property subject to the tax or the amount of tax to be raised should be determined by judicial inquiry, and a notice and hearing as to the amount of the tax and the manner in which it shall be apportioned are generally not necessary to due process of law. A tax does not violate the due process clause because it operates unjustly nor because it constitutes double taxation; and the motives or purpose of the taxing power cannot be inquired into, to invalidate a tax as a violation of the due process clause. If a tax is within the power of the Legislature, there is no violation of the due process clause because of the results which may or will arise from the tax. It seems that a tax does not violate the due process clause, as applied to a particular taxpayer, although the purpose of the tax will result in an injury rather than a benefit to such taxpayer." *Ibid.*, sec. 143.

When land is to be taken and devoted to the public service the owner must be given an opportunity to be heard with respect to the necessity of the taking, and the compensation to be paid; but the creation by the Legislature of a special taxing district is not a taking of property in this sense and does not violate the due process clause, even where no notice is given. Cooley, sec. 143, *supra.*; *Carson v. Sewer Comrs.*, 182 U. S., 398, 45 L. Ed., 1151; *Mount St. Mary's Cemetery Asso. v. Mullins*, 248 U. S., 501, 63 L. Ed., 383; *Valley Farms Co. v. Westchester*, 261 U. S., 155, 67 L. Ed., 585. Nor were the appellants entitled to notice that the tax would be levied; the due process clause does not require that persons taxed by the law of a state shall have an opportunity to be present or to be heard when the tax is assessed against them. *McMillen v. Anderson*, 95 U. S., 37, 24 L. Ed., 335.

It is argued here that as the town of Kenilworth has a sewer and drainage system of its own, the appellants will derive no benefit from the creation of the system which they assail. It has been held that property which cannot be directly or indirectly benefited by a drainage district may not be included therein merely for the purpose of assessing it for the benefit of other lands in the district. *Myles Salt Co. v. Board Comrs., supra.* In that case the area "included" was an island of high land which could not be a receptacle for stagnant water, and for this reason its inclusion was "palpably arbitrary and a plain abuse of power." *Valley Farms v. Westchester, supra.* But in *Miller & Lux v. Sacramento & S. J. Drainage District*, 256 U. S., 129, 65 L. Ed., 859 it was said: "Since *Houck v. Little River Drainage District*, 239 U. S., 254, 60 L. Ed., 266, the doctrine has been definitely settled that, in the absence of flagrant abuse or purely arbitrary action, a state may establish drainage districts and tax lands therein for local improvements, and that none of such lands may escape liability solely because they will not receive direct benefits." Moreover, *Carson v. Sewer Comrs., supra,* may be considered, under the facts in the case before us, as authority for the position that the appellants are benefited in being permitted to discharge their sewers into the more serviceable public sewers of the district.

The plaintiffs lay stress on their first proposition—that is, that they are excepted from the act of 1927 by the provisos in the eleventh section. This section authorizes the trustees, upon terms which are just and mutually satisfactory, to take over any sewer or water systems, or any part thereof, and requires them when they take it over by mutual agreement to pay a reasonable compensation. There is one proviso "that no person, firm or corporation owning any water system or sewerage system shall be compelled by the trustees to become a part of such sanitary district as is herein created unless the same is satisfactory to such person, firm, corporation or municipality owning any water system or sewerage system within the boundary of such created sanitary district," and another proviso that such systems may not be taken over or forced by the trustees to become a part of the sanitary district unless satisfactory to the owners. When taken over by mutual consent such system or systems shall be under the control of the trustees.

If the word "district" in the provisos be construed as synonymous with the boundary lines of the district these clauses would imply that the town of Kenilworth is not within the boundaries because it has not consented to become a part of the district. This construction would result in a contradiction of the third section, which, with no exception, describes the district by metes and bounds, it being admitted in the brief of the appellants that the town is within this area. If "district" signifies all the land within the prescribed boundaries, the town is obviously a part of the district by virtue of the third section, though its water system is not connected with that of the district. The provisos in our opinion, were not intended to empower the trustees to change or modify the defined area. Construing the act in its entirety and observing its manifest purpose we reach the conclusion, as contended by the defendant, that the word "district" as used in the provisos means "district system." By this construction the several sections of the act become operative, and effect is given to all. The town of Kenilworth is a part of the district, but it shall not be compelled by the trustees to become a part of the sanitary district system or to be taken over by them for this purpose without its consent. It is insisted that this construction burdens the appellants with double taxation; but the property of the plaintiffs is not twice taxed for the benefit of the taxing district. The county commissioners levy only one tax for the district and this is uniform and equal. Furthermore, neither the State nor the Federal Constitution affords protection against double taxation by the State. *Baker v. Druesdow,* 263 U. S., 137, 68 L. Ed., 212; *Person v. Watts,* 184 N. C., 499, 508.

In view of the questions proposed we see no reason why the demurrer should not be sustained and the judgment affirmed. The property of the appellants is within the taxing district and there is no allegation in the complaint that the tax was levied for any purpose not authorized by the public-local act, or that the levy exceeds the authorized rate and amount. We omit reference to the bonded indebtedness of the district and to the area embraced in the watershed of the Swannanoa River, and reach our conclusion upon the defendant's demurrer to the allegations in the complaint. Judgment
Affirmed.

HORACE T. KING, TRADING AND DOING BUSINESS AS HANOVER IRON WORKS v. G. C. ELLIOTT AND WIFE, EVA O. ELLIOTT, AND CENTRAL BANK & TRUST COMPANY.

(Filed 17 April, 1929.)

1. **Laborers' and Materialmen's Liens A a—Where contract is entire detailed itemization unnecessary.**

Where a materialman's lien under the provisions of C. S., 2433, is for a complete contract for a gross sum, it is not necessary that the statement be itemized as required in the case of divisible contracts for goods or labor.

2. **Same—Sufficiency of itemization.**

Where the claimant has attached and made a part of his lien an itemized statement of his account for labor and material he has furnished the owner of the building upon which he claims his lien under the provisions of C. S., 2433, showing on several specific dates "money advanced for payroll," "furnace contract," etc., each in stated amounts, it is held a sufficient itemization of his claims as required by the statute.

3. **Same—Construction of contract as entire.**

An affidavit to a lien filed under the provisions of C. S., 2433, that the "foregoing statement of account showing the goods sold, delivered, installed, and work done," etc., for a "furnace contract": *Held,* sufficient to show a complete contract for the furnace at the price itemized in the statement.

4. **Same—Finding by the court that contract was entire.**

Where it has been agreed by the parties that the trial judge find the facts upon the trial of the question of the sufficiency of a lien filed for material and labor furnished for a building, C. S., 2433, his finding that the contract was "to do certain work and furnish certain materials for a stated amount" under the evidence in the case is interpreted to mean that the contract referred to was entire.

5. **Materialmen's and Laborers' Liens B a—Materialman's lien prior to mortgage registered after time material was begun to be furnished.**

The lien for labor and material furnished to the owner of a building under the provisions of C. S., 2433, and notice filed as required by C. S., 2469, 2470, where furnished under an entire or complete contract for the various items as a whole, relates back to the time of the first delivery and work done under the contract, and is superior to a mortgage lien subsequently given and properly recorded.

6. **Laborers' and Materialmen's Liens B b—Dates stated in lien presumed correct.**

Where a lien filed under the provisions of C. S., 2433, gives the date to each item of labor or material furnished in relation to the building upon which the lien is sought, it will be presumed, nothing else appearing, that the dates given in the statement are correct.

STACY, C. J., dissents.

APPEAL by defendant, Central Bank & Trust Company, from *Cranmer, J.*, at September Term, 1928, of NEW HANOVER. Modified and affirmed.

It is admitted that the defendants, G. C. Elliott and wife, Eva O. Elliott, executed to the Central Bank & Trust Company, trustee, a deed of trust, to secure the indebtedness of $6,500 due the Continental Mortgage Company, on the premises described in the complaint. Said deed of trust was in the usual form and was recorded in the office of the register of deeds of New Hanover County, on 1 August, 1927, in Book 186, page 148. It is also admitted that the mortgage executed by the defendants, G. C. Elliott and wife, to the defendant, John Bright Hill, has been duly canceled of record, and that the plaintiff has taken a voluntary nonsuit as to the defendant, John Bright Hill, and also as to the defendant, Indemnity Insurance Company of North America.

The plaintiff introduced in evidence the following alleged lien, filed in the office of the clerk of the Superior Court on 31 December, 1927, and indexed in Lien Book A, p. 108, namely:

"State of North Carolina—County of New Hanover,
Wilmington, N. C.

To W. N. HARRISS, *Clerk of the Superior Court.*

Please take notice that Horace T. King, trading and doing business as Hanover Iron Works, claims a lien on the premises of G. C. Elliott hereafter described for labor done or material furnished for erecting a building or buildings thereon the labor done, or the amount of the material, the value thereof, and the dates at which the different items in detail were furnished, or labor done, are contained in the bill of particulars hereunto annexed. The amount of the claim is $761.04, and interest as shown by statement attached, marked Exhibit A, and the building or buildings, and premises are situated in the county of New Hanover, North Carolina (describing same by metes and bounds).

HORACE T. KING,
Trading and doing business as Hanover Iron Works.

Sworn to and subscribed before me, this 31 December, 1927.
W. N. HARRISS, *Clerk Superior Court.*"

Dr. G. C. Elliott, Wilmington, N. C.
Bought of Hanover Iron Works.

2 July, 1927, money advanced for payroll	$276.00
15 July, 1927, furnace contract	388.00
1 August, 1927, gutter, conductor and sheet metal	86.74
22 August, 1927, 4 bu. gravel, .50	2.00
200 lbs. asphalt, $3.75	7.50
8 lbs. galv. iron, .10	.80
	$761.04
Interest	20.86
	$782.00

"State of North Carolina—County of Hanover.

Horace T. King, being duly sworn, deposes and says that he is the owner of Hanover Iron Works, that the foregoing statement of account is just, true and owing, and correct copy from claimant's books, showing the goods sold and delivered, installed, and work done by claimants to above debtor. There are no offsets or counterclaims thereto, but the full sum of $761.04 is due and owing with interest from 15 July, 1927.

HORACE T. KING.

Sworn to and subscribed before me, this 31 December, 1927.
W. N. HARRISS, *Clerk Superior Court.*"

The plaintiff testified as follows: "I am the plaintiff in this action, and had a contract with G. C. Elliott to do certain work. The work was completed on the dates set out in the statement attached to the lien. The item for gravel was ordered separate by Dr. Elliott and sent out to the house. We began talking about this job in May. He told me he was going to build the house and we kept on discussing and figuring and finally some time in June we came to terms. I started to work about 1 June. *The contract was for a lump sum. He had nothing to do with the number of hours I spent or the material that I used.*"

The court below rendered the following judgment, in part:

"A jury trial having been waived by the parties and the court having found that the plaintiff contracted with the defendant, G. C. Elliott, *to do certain work and furnish certain material for stated amount* in connection with the construction of the plaintiff's house on the premises described in the complaint and that plaintiff has secured a consent judgment against G. C. Elliott in the sum of $761.04 and interest and condemning premises for sale described in complaint to satisfy said lien, and that said work was completed on the dates set out in the plaintiff's bill of particulars, attached to a lien filed by the plaintiff in the office of the clerk of Superior Court of New Hanover County, which said lien the court finds is in every respect a valid lien on the premises herein described, and the following issues having been submitted:

1. Is the defendant, G. C. Elliott, indebted to the plaintiff, and if so, in what amount?

2. Has the plaintiff established a valid lien on the property of the defendant G. C. Elliott, described in the complaint?

3. If so, is such lien a prior lien to the deed of trust on said property held by the Central Bank & Trust Company and recorded in the office of the register of deeds of New Hanover County, Book 186, page 148.

And it having been admitted that the defendant, G. C. Elliott, is indebted to the plaintiff in the amount of $761.04, with interest thereon from 15 July, 1927, and it being further admitted that the defendant, G. C. Elliott and wife, executed to the defendant, Central Bank & Trust Company, a deed of trust to secure the indebtedness of $6,500, which said deed of trust is in the usual form and contains the usual covenants and warranties of title and against encumbrances and was recorded in the office of the register of deeds of New Hanover County, on 1 August, 1927, in Book 186, page 148.

The court being of the opinion that the plaintiff's lien is a valid lien and is superior to the deed of trust held by the defendant, Central Bank & Trust Company, answered the first issue: $761.04 with interest from 15 July, 1927; the second issue Yes, and the third issue Yes."

Judgment was accordingly entered in favor of plaintiff and the judgment further set forth that upon payment of the claim by Central Bank & Trust Company, it was subrogated to the rights of the plaintiff.

At the conclusion of the evidence, the defendant, Central Bank & Trust Company, moved for a directed verdict in its favor on the grounds that the plaintiff had not secured a valid lien superior to the lien of the deed of trust, held by it, which motion the court overruled and the defendant, Central Bank & Trust Company, excepted, assigned error and appealed to the Supreme Court.

John A. Stevens for plaintiff.
K. O. Burgwin for defendant, Central Bank & Trust Company.

CLARKSON, J. The question involved: Is the lien filed by the plaintiff against the property of the defendant, G. C. Elliott, valid and enforceable, and superior to the deed of trust, executed by the defendants, G. C. Elliott and wife, to the defendant, Central Bank & Trust Company, conveying the property in controversy? We think so.

C. S., 2433, is as follows: "Every building built, rebuilt, repaired or improved, together with the necessary lots on which such building is situated, and every lot, farm or vessel, or any kind of property, real or personal, not herein enumerated, shall be subject to a lien for the payment of all debts contracted for work done on the same, or material furnished."

C. S., 2469, is as follows: "All claims against personal property, of two hundred dollars and under, may be filed in the office of the nearest justice of the peace; if over two hundred dollars or against any real estate or interest therein, in the office of the Superior Court clerk in any county where the labor has been performed or the materials furnished; but all claims shall be filed in detail, specifying the materials furnished or labor performed, and the time thereof. If the parties interested make a special contract for such labor performed, or if such material and labor are specified in writing, in such cases it shall be decided agreeably to the terms of the contract, provided the terms of such contract do not affect the lien for such labor performed or materials furnished."

C. S., 2470: "Notice of lien shall be filed as hereinbefore provided, except in those cases where a shorter time is prescribed, at any time within six months after the completion of the labor or the final furnishing of the materials, or the gathering of the crops."

In *McAdams v. Trust Co.,* 167 N. C., at p. 496, it is said: "Construing our statute on liens of mechanics and laborers, this Court held in *Burr v. Maultsby,* 99 N. C., 263, that the lien relates back to the time the work was commenced or the materials were furnished, and does not impair or affect encumbrances existing prior to that time but only those subsequently created." *Porter v. Case,* 187 N. C., at p. 636. *Harris v. Cheshire,* 189 N. C., 219.

In *Jefferson v. Bryant,* 161 N. C., at p. 406-7, it is said: "This action is to enforce a lien under section 2026 of the Revisal (C. S., 2469), which requires that 'all claims shall be filed in detail, specifying the materials furnished or labor performed, and the time thereof,' and it has been uniformly held, in construing this statute, that there must be a substantial compliance with its terms, and that the statement of time is material. *Wray v. Harris,* 77 N. C., 77; *Cook v. Cobb,* 101 N. C., 68. The headnote to the *Cook case,* which is fully sustained by the opinion, is that 'it is essential to the validity of a laborer's lien that the claim or notice which he is required to file shall set forth in detail the time when the labor was performed, its character, the amount due therefor, and upon what property it was employed; and if it is for materials furnished, the same particularity is required. Defects in these respects will not be cured by alleging the necessary facts in the pleadings in an action brought to enforce the lien.' This rule has been very generally modified when the contract is to complete a building for one sum, and in such case it is not required that the labor performed and the materials furnished shall be itemized, but that the time of the completion of the work shall be stated. The cases are collected in the notes in 27 Cyc., 188."

In the present action it is contended by plaintiff that his claim is founded on a *special contract* under the statute, and it is not necessary that the claim "be filed in detail, specifying the materials furnished or labor performed and the time thereof." That the present lien filed comes within the provisions of the statute and the decision on this aspect in the *Jefferson case, supra,* viz.: "This rule has been very generally modified when the contract is to complete a building for one sum, and in such case it is not required that the labor performed and the materials furnished shall be itemized, but that the time of the completion of the work shall be stated."

"Regardless of the conflict of authority as to the necessity of itemization generally, it is well established that, where the work was done, or the materials furnished under an *entire contract* to do *or furnish the same for gross sum,* it is not necessary that claimant should in his lien statement itemize his account." (*Italics ours*), 40 C. J., p. 242.

"A distinction runs through the authorities in regard to the particularity required in specifying the amount and character of the work done or materials furnished, and the prices charged therefor, where the claim rests upon open account and where the work done or materials furnished were contracted for as an entirety. More particularity of statement is required in the former than in the latter instance." *Francis & Co., Inc., v. Hotel Rueger, Inc.,* 125 Va., 106, 121, 99 S. E., 690.

Speaking to the subject, in 18 R. C. L., at p. 927, it is said: "As to the manner of setting forth or stating the facts to be embodied in the lien notice, however, it need not have the definiteness of a pleading. . . . (p. 935) The statutory requirements, whatever they may be, must be substantially complied with in order to perfect the lien. The affidavit required to verify it may be considered with the claim itself in ascertaining the sufficiency of the latter."

We must construe the whole lien, claim or notice, and affidavit, on this particular attitude together. The notice sets forth: (1) "Dates at which the different items in detail were furnished, or labor done, are contained in the bill of particulars hereunto annexed. The amount of the claim is $761.04." (2) Bill of particulars as follows:

"2 July, 1927,	money advanced for payroll	$276.00
15 July, 1927,	furnace contract	388.00
1 August, 1927,	gutter, conductor and sheet metal	86.74
22 August, 1927,	4 bu. gravel, .50	2.00
	200 lbs. asphalt, $3.75	7.50
	8 lbs. galv. iron	.80
		$761.04"

(3) The affidavit "that the foregoing statement of account is just, true, and owing, and correct copy from claimant's books, showing the goods sold and delivered, installed, and work done by claimants to above debtor." Unobjected to, plaintiff testified: "The contract was for a lump sum. He had nothing to do with the number of hours I spent or the material that I used."

Webster's Dictionary defines "install": "To set up or fix in position for use or service." To set up or fix in position for use or service the furnace, and the incidentals connected therewith, would take labor and material, and the furnace itself would be a considerable item in the cost. It will be presumed that the day the last item in the bill of particulars was the day the furnace was finally in the position for use and service. The implication from the subjects set forth in the bill of particulars is that the labor and material was used in connection with installing the furnace in plaintiff's dwelling-house.

A jury trial having been waived, the trial judge found that the plaintiff contracted with the defendant "to do certain work and furnish certain material for a stated amount," etc. This means, of course, that the contract was entire. There was sufficient evidence to support this finding.

We think the position taken by defendant too technical, under the facts and circumstances of this case, and the statute has been substantially complied with. It is admitted by plaintiff that the four bushels of gravel at 50 cents a bushel $2.00, had nothing to do with the lump sum contract and must be deducted from the $761.04.

It was said in *Cameron v. Lumber Co.,* 118 N. C., at p. 268: "No one need misunderstand it who should become interested in the property." The judgment below is

Modified and affirmed.

STACY, C. J., dissents.

O. E. UNDERWOOD v. J. E. DOOLEY.

(Filed 17 April, 1929.)

1. **Abatement and Revival B a—Former action abates subsequent action which should have been included in former—Pleadings.**

   The pendency of a suit involving substantially the same cause of action will prevent the plaintiff from maintaining a subsequent action upon any matters which were, or should have been, properly included within the scope of the former one, and the plaintiff may not maintain two separate actions for different damages resulting from the same negligent act, and a later action will be dismissed when this is properly made to appear.

2. **Same—Action by insured for personal injuries not abated by action by insurer for damages to automobile.**

   Where an insurance company, under a policy covering damage to an automobile alone, has paid the insured for damages to it caused by the negligence of a third person, and has recovered judgment in its action against the *tort-feasor*, the owner may maintain a subsequent action against the *tort-feasor* to recover damages for personal injury arising from the same tort, as such action is not substantially the same as the pending action nor between the same parties.

3. **Insurance O b—Insurance company paying insured is subrogated to his rights.**

   Where a company, under a policy covering damage to an automobile alone, has paid the insured the loss resulting from the act of a *tort-feasor*, it is entitled to maintain an action against the *tort-feasor* by subrogation to the owner's rights.

APPEAL by defendant from order of *Grady, J.*, at September Term, 1928, of SAMPSON. Affirmed.

This action was begun in November, 1927, and is now pending in the Superior Court of Sampson County. It was heard at September Term, 1928, of said court, on defendant's motion that the action be dismissed, (1) for that, at the date of its commencement an action against the defendant, begun by the Maryland Casualty Company, upon the same cause of action as that alleged in the complaint in this action, was pending in the Superior Court of Mecklenburg County, North Carolina; and, (2) for that, since the commencement of this action, a final judgment has been rendered in said action against this defendant, which he has paid and fully satisfied.

From an order denying his motion defendant appealed to the Supreme Court.

Algernon L. Butler for plaintiff.
C. H. Gover for defendant.

CONNOR, J. On 7 November, 1927, the plaintiff, O. E. Underwood, was driving his automobile on Clinton Street, in the town of Roseboro, Sampson County, North Carolina. A motor truck, owned by defendant, and driven by one of his employees, collided with plaintiff's automobile, on said street. As the result of said collision, plaintiff's automobile was badly injured; plaintiff also sustained serious personal injuries. In his complaint filed in this action, plaintiff alleges that said collision was caused by the negligence of the driver of said motor truck, and that defendant, as owner of said truck, and as employer of said driver, is liable for his damages caused by said collision. This action, which was begun in the Superior Court of Sampson County, is for the recovery, only, of damages for the personal injuries sustained by plaintiff and caused by said collision. Plaintiff does not demand in this action judgment that he recover damages for the injuries to his automobile. He does not allege in his complaint that he has suffered damages by reason of the injuries to his automobile; he alleges that by reason of the injuries to his person he has been damaged in the sum of $10,000. He demands judgment for this sum only.

At the date of said collision plaintiff's automobile was insured against loss or damage resulting from a collision, by a policy of insurance issued by the Maryland Casualty Company. By the terms of said policy the Maryland Casualty Company was subrogated to all the rights, claims and demands which the plaintiff had against the defendant for damages resulting from injuries to said automobile, caused by the negligence of defendant. Within a few days after said collision, and prior to the commencement of this action, the Maryland Casualty Company began an action against the defendant herein in the Superior Court of Mecklenburg County, North Carolina. In said action the Maryland Casualty Company, as plaintiff, demanded judgment that it recover of the defendant the sum for which it would be liable to plaintiff herein, under its policy, as damages to his automobile, resulting from the collision between defendant's truck and said automobile, on 7 November, 1927. It alleged that said sum was $2,500; it did not allege that it had paid or adjusted the loss prior to the commencement of said action. After the commencement of said action in the Superior Court of Mecklenburg County, and before the commencement of this action in the Superior Court of Sampson County, the Maryland Casualty Company paid to the plaintiff herein the sum of $3,000, in full settlement of the amount for which the said company was liable to plaintiff herein, under its policy, on account of the damage or loss which plaintiff had sustained from the injuries to his automobile. After the commencement of this action, and while the same was pending, at the request of said company, plaintiff executed a formal assignment, in writing, to the said Maryland Casualty Company of any and all claims and demands which he had against the defendant for or on account of the injuries and damage to his automobile, caused by the collision between said automobile and defendant's truck on 7 November, 1927. Thereafter, by consent, a judgment was entered in the action pending in the Superior Court of Mecklenburg County, wherein the Maryland Casualty Company was plaintiff, and the defendant herein was defendant, that the Maryland Casualty Company recover of the defendant the sum of $1,400, in full settlement of any and all claims which the said company had against said defendant by reason of the cause of action alleged in the complaint in said action. This judgment has been paid by defendant, and duly canceled on the record in the office of the clerk of the Superior Court of Mecklenburg County.

Upon the foregoing facts, which were made to appear to the court by an amendment to the answer, which defendant filed, by leave of the court, defendant moved that this action be dismissed (1) for that, at the date of its commencement, an action against the defendant, begun by the Maryland Casualty Company, upon the same cause of action as that alleged in the complaint in this action, was pending in the Superior Court of Mecklenburg County, North Carolina; and (2) for that, since the commencement of this action, a final judgment has been rendered in said action, which defendant has paid and fully satisfied. Defendant's motion was denied; defendant excepted, and appealed to this Court.

In the original answer filed by defendant in this action, the allegations of negligence, which constitute plaintiff's cause of action herein, are denied; defendant also pleads, in bar of plaintiff's recovery, his contributory negligence. The facts on which defendant relies to sustain his motion that this action be dismissed, appear from his amended answer. They do not appear on the face of the complaint. In *Alexander v. Norwood,* 118 N. C., 382, 24 S. E., 119, it is said: "Where an action is instituted, and it appears to the Court by plea, answer or demurrer that there is another action pending between the same parties, and substantially on the same subject-matter, and that all material questions and rights can be determined therein, such action will be dismissed." In *Emry v. Chappell,* 148 N. C., 327, 62 S. E., 411, it is said: "The general principle of the law is that the pendency of a prior suit for the same thing, or as is commonly said, for the same cause of action between the same parties in a court of competent jurisdiction, will abate a later suit, because the law abhors a multiplicity of suits, and will not permit a debtor or a defendant to be harassed or oppressed by two actions, if even substantially alike, to recover the same demand, when the plaintiff in the second action could have a complete remedy by one of them. The principle is based upon the supposition that, if the first suit is so constituted as to be effective and available, and also to afford an ample remedy to the plaintiff in the second, the latter is unnecessary and should be dismissed." In *Allen v. Salley,* 179 N. C., 147, 101 S. E., 545, it is said that when the pendency of another action between the same parties, upon the same subject-matter, in another county, appears upon the face of the complaint, a demurrer on that ground will be sustained; and that when the pendency of such action is made to appear by answer, a motion that the second action be dismissed, should be allowed. In *Construction Co. v. Ice Co.,* 190 N. C., 580, 130 S. E., 165, a judgment dismissing the action, which was begun in Mecklenburg County, for that another action between the same parties, involving substantially the same subject-matter, was pending in another county, was affirmed, upon the authority of the above-cited cases of *Allen v. Salley, Emry v. Chappell* and *Alexander v. Norwood.*

It is well settled, therefore, by authoritative decisions of this Court that where an action is begun in a court of this State, and it is made to appear to said court, either by demurrer or by answer to the complaint, that at the date of its commencement there was pending in said court or in any court in this State of competent jurisdiction, another action between the same parties, involving the same, or substantially the same subject-matter, or cause of action, wherein all the rights of the parties thereto may be fully and finally determined and adjudicated, the action last begun will be dismissed.

As the result of the collision between plaintiff's automobile and defendant's motor truck, upon the allegations of the complaint in this action, plaintiff had a cause of action against the defendant on which he was entitled to recover damages for all the injuries which he had sustained and which were caused by said collision. On this cause of action plaintiff could have recovered, in one action, damages for the injuries, both to his automobile and to his person. He had, however, only one cause of action against the defendant, for defendant's tort, out of which the cause of action arose, was single and entire. He could not have split this cause of action, and maintained two actions against defendant, one for the recovery of damages resulting from injuries to his automobile, and the other for the recovery of damages resulting from injuries to his person. Had plaintiff undertaken to split his cause of action, and instituted two actions, one for the recovery of damages resulting from injuries to his automobile, and the other for the recovery of damages resulting from injuries to his person, the second action would have been dismissed, for that the first action, involving the same subject-matter or cause of action was pending when the second action was begun. *Allen v. Salley, supra.* The recovery of a judgment in the first action, whether for damages to person or to property, would have barred a recovery in the second action. *Eller v. R. R.,* 140 N. C., 140, 52 S. E., 305. In the last cited case, it is said: "The general rule in the law of damages is that all damage resulting from a single wrong or cause of action must be recovered in one suit. The demand cannot be split, and several actions maintained for the separate items of damage. Plaintiff recovers one compensation for all loss and damage, past and prospective, which were the certain and proximate results of a single wrong or breach of duty." It was accordingly held in that case, that the action which plaintiff had begun in the Superior Court to recover of defendant damages for a personal injury, caused by the wrongful act of defendant, was properly dismissed, when it was made to appear to the court that plaintiff had theretofore, in another action, recovered of defendant a judgment for damages resulting from an injury to her property, caused by the same wrongful act of the defendant. The decision in *Eller v. R. R.* is cited and approved in *Barcliff v. R. R.,* 176 N. C., 39, 96 S. E., 644. It is said in the opinion in the last cited case: "No man should be twice vexed for the same cause. The plaintiff may carve out as much as the law allows him in the first instance, but he will not be permitted to cut more than once." In *Allen v. Salley, supra,* which was an action begun in the Superior Court of Buncombe County to recover damages for injuries caused by a collision between an automobile and a truck, it was held that the action should be dismissed, when it was made to appear to the court, that at the date of its commencement, an action between the same parties, upon the same subject-matter or cause of action was pending in the Superior Court of Polk County. In that case it is said: "The collision was but one transaction, and the whole matter should be tried, and the liabilities of all parties determined in the first action."

It is, therefore, well settled in this jurisdiction that one who has sustained damages, resulting from injuries both to his property, and to his person, caused by the single wrong or tort of another, can maintain only one action for the recovery of his damages, and that he cannot split his cause of action, arising from a single wrong or tort, and maintain separate actions against the *tort-feasor,* as defendant, and recover therein for separate items of damage resulting from said wrong or tort.

An action to recover damages for injuries either to person or to property, caused by the single wrong or tort of the defendant, will be dismissed when it is made to appear to the court in which such action was begun and is pending, that another action begun by the same plaintiff against the same defendant, upon the same, or substantially the same cause of action, to recover damages for another injury, whether to person or to property, was pending in said court, or in another court in this State of competent jurisdiction to try and determine the issues involved in said action, at the date of the commencement of said action. A judgment recovered in the first action will bar a recovery in the second action, although the damages demanded in the second action are for a different injury from that for which the plaintiff recovered in the first action.

The principles above stated are well settled as the law of this jurisdiction, by authoritative decisions of this Court, and are in accord with decisions of courts in other jurisdictions, which are cited in the brief filed in this Court for the defendant. They are not, however, determinative of the question presented for decision by this appeal.

The action begun in the Superior Court of Mecklenburg County and pending therein at the commencement of this action, was not begun by the plaintiff in this action; said action was begun by the Maryland Casualty Company, to recover judgment against the defendant in its own behalf, and not in behalf of the plaintiff herein. The judgment entered in said action, by consent of the parties thereto, was not recovered by the plaintiff in this action; it was recovered by the Maryland Casualty Company, on the cause of action alleged in its complaint in said action. The facts alleged as constituting said cause of action include the facts which plaintiff in this action alleges as his cause of action against the defendant; other facts, however, are alleged by the Maryland Casualty Company, in its complaint in said action, and were essential to constitute a cause of action on which the said company, as plaintiff in said action, was entitled to recover of defendant therein. It cannot be held that the cause of action alleged in the action pending in the Superior Court of Mecklenburg County, at the date of the commencement of this action, is the same, or even substantially the same as that alleged by the plaintiff in this action. The Maryland Casualty Company could not have recovered of defendant solely upon the facts which constitute the cause of action alleged by the plaintiff in this action. It was required to allege and did allege facts from which it appeared that it was the real party in interest with respect to the subject-matter of the action, to wit, damages for injuries to the automobile owned by plaintiff in this action, caused by the wrongful act or tort of defendant.

At the date of the commencement of this action, the plaintiff had been fully compensated for the damage which he had sustained by reason of the injuries to his automobile. This damage had been paid by the Maryland Casualty Company, in discharge of its liability to plaintiff under its policy of insurance. No part of said damage had been paid by the defendant, who upon the allegations of the complaint in this action, was liable to plaintiff for such damage, as well as for the damages to plaintiff's person. The Maryland Casualty Company, having paid the damage to plaintiff's automobile, for which it was liable under its policy, had a cause of action against the defendant, upon its allegation that said damage was the result of an injury caused by defendant's wrongful act or tort. The Maryland Casualty Company alone could maintain an action to recover of defendant the sum which it had paid to the plaintiff, the insured under its policy, for it, and not the plaintiff, was the real party in interest. In *Cunningham v. R. R.,* 139 N. C., 427, 51 S. E., 1029, it was held by this Court that when an insurer has paid the loss or damage for which it was liable under its policy to the insured, it is subrogated to the rights of the insured, and can alone, as the real party in interest, maintain an action against the wrongdoer, and that it is immaterial whether the insured makes an actual assignment of his right of action or not. The insurer is subrogated not necessarily by virtue of the provision of the policy, but upon principles of equity to the right of action, if any, of the insured against the wrongdoer, who has caused the damage. In that case the action brought by the insured who had been fully compensated by the insurer, against the wrongdoer, was dismissed, upon the ground that the insured was not the real party in interest and for that reason could not maintain the action to recover of the wrongdoer the damages which he had sustained, but which had been fully paid by the insurer. This decision has been cited and approved in *Insurance Co. v. Lumber Co.,* 186 N. C., 269, 119 S. E., 362, and in *Powell v. Water Co.,* 171 N. C., 290, 88 S. E., 426. In the last cited case the following statement of the law is approved by this Court: "When an insurance company pays to the insured the amount of a loss of the property insured, it is subrogated in a corresponding amount to the assured's right of action against any other person responsible for the loss. This right of the insurer against such other person is derived from the assured alone, and can be enforced in his right only. At common law it must be asserted in the name of the assured. In a court of equity or of admiralty, or under the modern codes of practice, it may be asserted by the insurance company in its own name, when it has paid the insured the full value of the property destroyed."

We have not overlooked the fact that in the complaint filed by the Maryland Casualty Company in the action begun in the Superior Court of Mecklenburg County, it is not alleged that said company has paid the loss or damage to the automobile. It only alleges that it is liable for such loss as the owner has sustained. For the purposes of this decision, we do not think this fact is material.

The denial of defendant's motion in this action is sustained by authoritative decisions of this Court; it is supported by well settled legal principles; it is in accord with justice, and is both sustained and supported by sound policy.

It cannot be held as law in this State that the owner of an automobile, who as the result of the wrong or tort of another, has sustained damages both to his automobile and to his person, and whose automobile is insured against the loss or damage which he has sustained because of injuries to his automobile, is put to an election whether or not he shall, in order to maintain an action against the wrongdoer to recover damages for injuries to her person, release the insurance company from all liability to him under its policy. He does not lose his right of action to recover for the injuries to his person, by accepting from the insurance company the amount for which it is liable to him, under its policy, because the insurance company thereafter upon the cause of action which has accrued to it, recovers of the wrongdoer the amount which it has paid the owner of the automobile in discharge of its liability under the policy. This is not unjust to the wrongdoer, who is thereby required to pay only the full amount for which he is liable because of his wrong or tort. The order denying defendant's motion is

Affirmed.

C. C. WIMBISH v. A. C. HATTAWAY.

(Filed 17 April, 1929.)

Contracts B d—Time of expiration of option.

An option good "until" a day specified includes that day.

CIVIL ACTION, before *Shaw, J.*, at November Term, 1928, of GUILFORD.

On 16 February, 1927, Glenn M. McCall and the defendant, A. C. Hattaway, entered into a written contract, providing in substance that

McCall should sell to the defendant, Hattaway, a diamond ring for the sum of $962.50. Hattaway agreed to give to McCall an option to repurchase the above-mentioned ring for the sum of $1,000, said option "to hold good until the first day of October, 1927." McCall, the holder of the option, duly transferred it to the plaintiff. On 1 October, 1927, Wimbish tendered to the defendant $1,000 and demanded the ring. The defendant refused to deliver the ring, contending that the option expired at midnight on 30 September, and that, therefore, the tender came too late.

Issues were submitted to the jury and were answered in favor of the plaintiff.

The verdict awarded to plaintiff damages in the sum of $400. From judgment upon verdict the defendant appealed.

A. C. Davis for plaintiff.
King, Sapp & King for defendant.

PER CURIAM. The sole question of law presented is whether the words "until the 1st day of October, 1927," include the first day of October.

The decisions in other jurisdictions are not in accord; but it has been expressly decided in this State that the word "until," when used in reference to an act to be done on a day certain, includes the day specified. *Thomas v. Nichols,* 127 N. C., 319, 37 S. E., 327.

Affirmed.

CLAYTON C. RICHARDSON v. T. W. RITTER.

(Filed 17 April, 1929.)

Negligence C a—Act of defendant held contributory negligence barring recovery.

Where one seeks to recover damages for a negligent personal injury resulting from his diving into the shallow water of a public swimming pool, about twenty feet from the diving board, and hitting his head on the concrete bottom, his own negligence in not ascertaining the depth of the water before diving will bar his recovery.

APPEAL by plaintiff from *Shaw, J.,* at October Term, 1928, of GUILFORD. Affirmed.

This is an action to recover damages for personal injuries, alleged to have been caused by the negligence of defendant, in failing to exercise due care to inform plaintiff, a patron of defendant's swimming pool, that the water in said swimming pool at the place where plaintiff dived into said pool was too shallow for diving, and that the bottom of said pool, at said place, was constructed of concrete.

Defendant denied the allegations of negligence, and also relied upon his plea that plaintiff is barred of recovery, by his contributory negligence, as alleged in the answer.

From judgment dismissing the action, at the close of plaintiff's evidence, as of nonsuit, plaintiff appealed to the Supreme Court.

D. Newton Farnell, Jr., B. L. Fentress and F. P. Hobgood, Jr., for plaintiff.

King, Sapp & King for defendants.

PER CURIAM. On 9 July, 1926, defendant owned a tract of land in Guilford County, on which he had constructed an artificial lake. This lake was operated by defendant as a public swimming pool. Patrons of said swimming pool were charged for admittance to said pool, and for the privilege of bathing, swimming and diving therein.

Plaintiff, accompanied by his wife and children, went to defendant's swimming pool late in the afternoon of 9 July, 1926. Having paid the sum charged for admittance to said pool, and for the privilege of swimming and diving therein, plaintiff within a short time thereafter dived from the edge of said pool into the same; at said place the water was shallow, and the bottom was constructed of concrete. Plaintiff's head struck the concrete bottom of the pool; he was thereby injured, and by reason of such injuries suffered damages. No notice was given plaintiff by signs or otherwise of the depth of the water at the place where he dived into the pool. There was a spring-board, constructed for diving at a distance of 15 or 20 feet from the place where plaintiff dived. Plaintiff made no inquiries of defendant or of any one else as to the depth of the water at the place where he dived, nor did he make any effort to ascertain whether it was safe to dive into said pool at this place.

Even if it should be held that there was evidence from which the jury could have found that defendant was negligent as alleged in the complaint—which is doubtful—and that such negligence was the cause of plaintiff's injuries, all the evidence tends to show that plaintiff was negligent, and that his negligence contributed, as a proximate cause, to his injuries. He, therefore, cannot recover of defendant in this action, the damages which resulted from his injuries.

The judgment dismissing the action is affirmed upon the authority of *Elder v. R. R.,* 194 N. C., 617, 140 S. E., 298, and of decisions cited in the opinion in that case.

Affirmed.

ALBERT PICK & COMPANY v. MOREHEAD BLUFFS HOTEL COMPANY, INC.

(Filed 24 April, 1929.)

1. **Principal and Agent C a—Implied authority of agent authorized to make purchase to do so on credit of principal—Conditional Sales.**

   An agent appointed for the purchase of goods, without being given the money for which to pay for them, has implied authority to purchase them on the credit of his principal, and to do such other things in pursuance of the authority directly given as are reasonably necessary to consummate the transaction, and in this case, involving a large expenditure for the furnishing of a hotel, the execution of a contract wherein the vendor retained title for the security of the purchase price.

2. **Same—Where agent has implied authority to execute conditional sales contract the form of execution immaterial between parties.**

   As between the vendor and purchaser it is immaterial in what form the agent authorized to purchase certain merchandise signed the contract, which in case of an incorporated agent is sufficient if signed by its president. C. S., 1139.

3. **Sales I a—Between parties to conditional sales contract registration not necessary.**

   Between the parties to a conditional sales contract probate and registration is not required by statute. C. S., 3312.

4. **Contracts B a—Interpretation of contract by parties will be generally adopted.**

   An interpretation that the parties to a contract have given it will be generally adopted by the court, and a contract for the purchase of furniture for a hotel subject to an itemization given therein and to such minor adjustments as may take place from time to time as the unit prices set forth, is held to cover additional items amounting to about $11,000, ordered and accepted by the vendee and shipped by the vendor under the contract.

APPEAL by Morehead Bluffs Hotel Company, Inc., from *Nunn, J.*, at November Term, 1928, of CRAVEN. No error.

It is alleged in the complaint that on 12 May, 1926, plaintiff sold to the defendant certain personal property at the agreed price of $48,370.48, which was afterwards increased by the sale of other articles under the contract to $59,370.88; that this sum was credited with $5,000 paid in cash and with an item of $1,133, leaving as the amount due the plaintiff $53,237.88, with interest at 6 per cent on the amount of each shipment from the time the shipment was made.

The defendant denied the material allegations of the complaint and for a further defense alleged that the property, consisting of furniture and other articles, was bought on an open account and not under a contract by which the title was retained by the plaintiff; that it did not authorize such a contract, and that when it learned about a year after the sale that the plaintiff claimed retention of the title, it offered to return the goods and demanded that the alleged contract be canceled and that the furniture be removed from the hotel.

The plaintiff had the property seized under proceedings in claim and delivery and the defendant executed a replevin bond and kept possession of the property. The case came on for trial and the following verdict was rendered:

1. Is defendant indebted to the plaintiff? Answer: Yes.
2. If so, in what amount? Answer: $53,237.88, with interest.
3. Is the plaintiff the owner and entitled to the immediate possession of the personal property described in the complaint and the sheriff's return? Answer: Yes.
4. If so, what was the value at the time of the seizure of the property? Answer: $38,000.
5. What damage, if any, has the property sustained by deterioration since the seizure? Answer: $3,800.
6. What damage has plaintiff sustained by reason of the wrongful detention of the said property? Answer: Six per cent of $38,000.

It was thereupon adjudged that the plaintiff recover of the defendant $53,237.88 with interest from 1 January, 1927; that the property be sold and that the plaintiff recover $3,800 as damages for deterioration, or if possession could not be had that the plaintiff recover the value of the property with interest, etc. The plaintiff excepted and appealed upon error assigned.

Ringer, Wilhartz & Hirsch and Ward & Ward for plaintiff.
Whitehurst & Barden for defendant.

ADAMS, J. On 20 March, 1926, the defendant entered into a written contract with a Delaware corporation known as the William Foor Hotel Operating Corporation, by which the defendant agreed to build a modern hotel and casino at Morehead Bluffs and to furnish the building with first-class modern hotel furniture and equipment. It was agreed that the Foor Corporation, upon receipt of a written request from the defendant, should purchase for the defendant at a price acceptable to the parties all the furniture and equipment for the hotel in consideration of five per cent of the total cost. On 12 May, 1926, a written instrument, called a thirty-day agreement, was signed by the plaintiff and by "William Foor Hotel Operating Corporation for the Morehead Bluffs Hotel Company, by William Foor, Pres." This paper purports to be an offer by the plaintiff to sell the furniture and an acceptance of the offer by the Foor Corporation for the defendant. It contains this clause: "The title to said merchandise shall remain in the seller until the same shall be fully paid for."

It is contended that this alleged contract is not binding on the defendant because it was not executed by the defendant or any of its officers, but by the Foor Corporation for the defendant. This objection is addressed to the question of the defendant's execution of the instrument and not to the signature of the Foor Corporation. Its name was signed by its president, and it is provided by statute that written contracts for the purchase of personal property by corporations in which title is retained as a security for the purchase price are sufficiently executed if signed in the name of the corporation by the president, secretary, or treasurer in his official capacity. C. S., 1139. The question is whether the execution of the contract by the Foor Corporation for the Morehead Bluffs Hotel Company binds the defendant. By the contract of 25 March, 1926, the defendant appointed the Foor Corporation its agent to purchase furniture; and the instrument of 12 May, 1926, is intended to be a contract between the plaintiff as seller and the defendant as buyer. The parties are the plaintiff and the defendant. It is therefore immaterial whether the contract was signed in the name of the defendant by the Foor Corporation or in the name of the Foor Corporation for the defendant. Either form would be sufficient. *Cadell v. Allen,* 99 N. C., 542; *Ramsey v. Davis,* 193 N. C., 395; 21 R. C. L., 848, sec. 27. The contract as between the parties, if properly executed, is valid without reference to its probate and registration. C. S., 3312; *Kornegay v. Kornegay,* 109 N. C., 188.

Another position of the appellant is this: the appointment of an agent to purchase personal property does not authorize such purchase when the title is retained to secure payment of the agreed price. As no funds were given the agent to pay for the furniture he had the implied power to make the purchase on the credit of the defendant. In *Brittain v. Westall,* 137 N. C., 30, it is said: "It may be taken as a settled principle in the law of agency that if express authority to buy on a credit is not given to an agent, but he is authorized to make the purchase and no funds are advanced to him to enable him to buy for cash, he is, by implication, clearly authorized to purchase on the credit of his principal, because when an agent is authorized to do an act for his principal, all the means necessary for the accomplishment of the act are impliedly included in the authority, unless the agent be in some particular expressly restricted." *Ruffin v. Mebane,* 41 N. C., 507; *Swindell v. Latham,* 145 N. C., 144. In the law of agency this rule also is in force: "Whenever a principal has placed an agent in such a situation that a person of ordinary prudence, conversant with business usages and the nature of the particular business, is justified in assuming that such agent is authorized to perform in behalf of his principal the particular act, and such particular act has been performed the principal is estopped from denying the agent's authority to perform it." 21 R. C. L., 856.

The agent contracted for the purchase of property valued at about $50,000; no money was paid, no security was tendered, and the financial standing of the defendant was uncertain. In these circumstances the plaintiff was justified in assuming that the agent was authorized to purchase though the title was retained; and, having received the furniture, the defendant cannot now repudiate its contract on the ground of the agent's want of power. There is ample evidence that the contract was duly executed.

The price of the goods first shipped was $48,370.48; but afterwards upon the defendant's order other articles were shipped on the same account and under the original contract. This was done pursuant to a stipulation in the thirty-day agreement to this effect: "Subject to the itemization given therein and to such minor adjustments as may take place from time to time at the unit prices set forth." There is evidence that the parties construed this stipulation by changing items amounting to about $11,000 from one of the accounts to the other, leaving the remainder as alleged in the complaint, as admitted in the defendant's evidence, and as shown by the statement from the records of the defendant. Where it appears that the parties themselves have practically interpreted their contract the courts generally will adopt their construction. *Lewis v. Nunn,* 180 N. C., 159; *Wearn v. R. R.,* 191 N. C., 575.

What has been said disposes of the three propositions stated in the appellant's brief. There are forty-nine exceptions in the record, some of which relate to the admission or rejection of evidence. It is not necessary to refer to them in detail; in our examination of them we have found no reason for awarding a new trial.

No error.

STATE v. A. H. RITTER, L. E. VAUGHN, WOLSEY WALL AND ALEX McKENZIE.

(Filed 24 April, 1929.)

1. **Criminal Conspiracy A a—Definition of the crime.**

A criminal conspiracy is the unlawful concurrence of two or more persons in a scheme or agreement to do an unlawful act, or to do a lawful act in an unlawful way or by unlawful means, and does not require the accomplishing of the purpose in contemplation or any overt act in furtherance thereof.

2. Criminal Conspiracy B a—Competency of evidence of coconspirator.

The acts and declarations of each conspirator, while done in furtherance of the unlawful purpose or the testimony of one of them in regard to the conspiracy, is competent evidence against them all, but testimony given by one of the conspirators of his acts done in the absence of the others and in derogation of the purpose of the conspiracy is incompetent against the others, and as to them its admission constitutes reversible error.

APPEAL by defendants, A. H. Ritter and L. E. Vaughn, from *Sink, Special Judge,* at October Term, 1928, of RICHMOND.

Criminal prosecution tried upon an indictment charging A. H. Ritter, L. E. Vaughn, Wolsey Wall and Alex McKenzie with conspiring, confederating and agreeing among themselves to kill and murder one Cleveland Cagle; and in carrying out said conspiracy, it is alleged that they offered to pay one Charlie Patterson the sum of $200 to aid them in their unlawful scheme, etc.

The evidence on behalf of the State tends to show that on Sunday, 3 July, 1927, A. H. Ritter, L. E. Vaughn and Alex McKenzie went to the home of a colored man by the name of Charlie Patterson and told him they would give him $200, and see that he was protected, if he would induce Cleveland Cagle, on the following day, to come where they could get hold of him; that they would drive their car below Cagle's house, feign a breakdown, send Patterson to ask his help, and when he came out to the road they would strike him with a club, run over him with the car, and make it appear that his death was an accident, and that they would have the sheriff with them so Patterson would have nothing to fear. Ritter said Cagle had been tearing up their distilleries and that he ought to be killed.

As the alleged conspirators were drinking, Patterson testified that he paid very little attention to what they said.

But on the following day Alex McKenzie returned, and said to Patterson—none of the others being present: "Those fellows that came here yesterday won't do to fool with. I know them. I am white and you are black. It won't do to do anything like that. They will break our necks." The defendants Ritter and Vaughn, who alone were being tried, duly objected to the introduction of this evidence. Overruled and exception.

Patterson, at the instance of McKenzie, called the sheriff and told him of the proposition that had been made to him.

Ritter and Wall, but not Vaughn, came to Patterson's house about 10 o'clock on Monday, 4 July, as they had suggested the day before, but left before the sheriff arrived.

Here the conspiracy seems to have ended.

Verdict: Guilty as to A. H. Ritter and L. E. Vaughn, the only defendants on trial.

Judgment: Imprisonment as to both in the State's prison at hard labor for a term of not less than four nor more than ten years.

The defendants appeal, assigning errors.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

F. W. Bynum, Smith & Smith, L. B. Clegg and W. R. Clegg for defendants.

STACY, C. J., after stating the case: The gist of a criminal conspiracy is the unlawful concurrence of two or more persons in a wicked scheme—the agreement to do an unlawful act or to do a lawful act in an unlawful way or by unlawful means—and it is said that the crime is complete without any overt act having been done to carry out the agreement. *S. v. Van Pelt,* 136 N. C., 633, 49 S. E., 177; *S. v. Dalton,* 168 N. C., 204; 83 S. E., 693; *S. v. Trammell,* 24 N. C., 379. "If two or more persons conspire to do a wrong, this conspiracy is an act 'rendering the transaction a crime,' without any step taken in pursuance of the conspiracy." *S. v. Brady,* 107 N. C., 822, 12 S. E., 325. The crime of conspiracy consists of the *conspiracy,* and not of its execution. *S. v. Younger,* 12 N. C., 357.

One who enters into a criminal conspiracy, like one who participates in a lynching, or joins a mob to accomplish some unlawful purpose, forfeits his independence and jeopardizes his liberty, for, by agreeing with another or others to do an unlawful thing, he thereby places his safety and security in the hands of every member of the conspiracy. The acts and declarations of each conspirator, done or uttered in furtherance of the common, illegal design, are admissible in evidence against all. "Every one who enters into a common purpose or design is equally deemed in law a party to every act which had before been done by the others, and a party to every act which may afterwards be done by any of the others, in furtherance of such common design." *S. v. Jackson,* 82 N. C., 565.

But to make the acts and declarations of one person those of another, or to allow them to operate against another or others, it must appear that there was a common interest or purpose between them and that said acts were done, or said declarations uttered, in furtherance of the common design, or in execution of the conspiracy. *S. v. George,* 29 N. C., 321.

Proof of the acts done in pursuance of the common design by one of the conspirators, even though not on trial, and of his declarations made after the entry of the defendants into the combination, and up to the time when the offense was committed, is competent against all. *S. v. Turner,* 119 N. C., 841, 25 S. E., 810; *S. v. Anderson,* 92 N. C., 732. But declarations of one of the conspirators, made after the offense has been committed and in the absence of the others, are not competent against the others, because not uttered in furtherance of the common design. *S. v. Dean,* 35 N. C., 63.

The declarations of Alex McKenzie, made after he had abandoned the conspiracy, and not in furtherance of the common design, but in derogation of it, and in the absence of the other conspirators, while competent against him, yet, we think, are inadmissible as evidence against the defendants Ritter and Vaughn. *S. v. Dean, supra; S. v. George, supra.* Nor can the admission of this evidence be held for harmless error. It undoubtedly weighed heavily against the defendants.

There are other exceptions appearing on the record worthy of consideration, but as they are not likely to arise on another hearing, we shall not consider them now.

For error in the admission of incompetent evidence, as indicated, a new trial must be awarded; and it is so ordered.

New trial.

COUNTY OF ROCKINGHAM v. NORFOLK & WESTERN RAILWAY COMPANY.

(Filed 24 April, 1929.)

Highways A a—Where Highway Commission has closed grade crossing, county may not reopen it upon reincorporating abandoned highway.

The State Highway Commission is given exclusive authority by statute to eliminate and close grade crossings of railroad tracks on the highway, and when it has so closed a grade crossing and substituted an underpass in the interest of public safety, 3 C. S., 3846(j), 3846(y), the commissioners of a county are without power to order the grade crossing abandoned by the Commission reopened to the public, and this power is not given the county by C. S., 3846 (e 5), authorizing the county commissioners to reincorporate into the county systems any portion of highway abandoned by the State Highway Commission. See, also, the declaratory statute ratified 18 March, 1929.

CIVIL ACTION, before *MacRae, Special Judge,* at February Term, 1929, of ROCKINGHAM.

The plaintiff alleged that the State Highway Commission took over and incorporated into the State system of highways a public road between Stoneville, North Carolina, and the Virginia line, and thereafter hardsurfaced the road to a point known as Price Station. When the Highway Commission first assumed control of the road there was a grade crossing just beyond Price Station. The trial judge found as a fact that in the latter part of 1926, or early part of 1927, the State Highway Commission "abandoned that part of the road just beyond Price Station and followed another county road for a distance of about 400 yards and eliminated said crossing . . . after the said Highway Commission had constructed a concrete overhead bridge over the railroad track and had built and extended the new hard-surface road along the west boundary of the church property, bringing the new hard-surface highway back into the old road as it formerly ran . . . closing the old road, and required the Norfolk & Western Railway Company to pay one-half of the expense of the said overhead bridge." Soon after completing the hard-surface road and the building of said overhead bridge, the defendant planted posts across the old public road on the south side of the crossing and on its right of way and tore up and destroyed the said crossing "after obtaining authority from the State Highway Commission to do so." Thereafter, on 11 September, the plaintiff brought this suit against the defendant to compel it to remove said obstruction and restore said grade crossing upon the ground that the portion of the old road abandoned by the State Highway Commission had been duly reincorporated into the county public road system of plaintiff in accordance with C. S., 3846 (e 5).

The trial judge issued a writ of mandamus to compel the defendant to restore said grade crossing, and the defendant appealed.

Sharp & Sharp, W. R. McCargo and H. L. Fagge for plaintiff.

F. M. Rivinus, Burton Craige, Scott & Brewer and Murray Allen for defendant.

BROGDEN, J. The determinative questions of law presented are:

1. Did the State Highway Commission have power to eliminate said grade crossing?

2. If so, was such power modified or destroyed by Public Laws of 1927, ch. 46, sec. 5, C. S., 3846 (e 5)?

C. S., 3846(k) expressly delegates to the State Highway Commission power "to regulate, abandon and close to use all grade crossings on any road designated as part of the State highway system . . . and whenever an underpass or overhead bridge is substituted for a grade crossing, the commission shall have power to close to use and abandon such grade crossing and any other crossing adjacent thereto." Power is also given the State Highway Commission to eliminate grade crossings by compelling the railroads to pay one-half the expense thereof.

C. S., 3846(y). Exclusive jurisdiction over and control of grade crossings is expressly conferred upon the State Highway Commission by C. S., 3846(z).

The overhead bridge near Price Station was substituted for the grade crossing theretofore existing and was constructed by the defendant and the State Highway Commission in compliance with the provisions of the statute and for the express purpose of eliminating this particular grade crossing in the interest of public safety. Under the law as written the State Highway Commission had exclusive control of the crossing, and therefore had exclusive power to "close to use such grade crossing."

Public Laws of 1927, ch. 46, sec. 5, C. S., 3846 (e 5), authorizes a county to reincorporate into the county system any portion of a road duly abandoned by the State Highway Commission. This statute, however, neither by express terms nor by implication, undertakes to disturb or affect the exclusive jurisdiction of the State Highway Commission over grade crossings which it is authorized to eliminate. Moreover, the grade crossing in controversy was duly "closed to use" before the abandonment of the small portion of the road leading to the crossing. While the county has the right to reincorporate such abandoned portions of a road, it must necessarily follow that they must be reincorporated in the condition in which the Highway Commission left them. The Highway Commission left or abandoned this road with the grade crossing "closed to use." The county, therefore, has no power under the law to require the Highway Commission or the defendant to restore a grade crossing which has been duly abolished in compliance with the statute. This view of the law received declaratory sanction by the General Assembly by an act ratified 18 March, 1929, which provides in substance that county road-governing authorities are not authorized to reopen any railroad grade crossing closed by order of the State Highway Commission "in connection with the building of an overhead bridge or underpass to take the place of such grade crossing."

Reversed.

E. B. ATKINSON, ON BEHALF OF HIMSELF AND OTHERS, v. E. C. GREENE ET AL., AND THE CITY OF ASHEVILLE AND THE FRENCH BROAD CEMETERY.

(Filed 24 April, 1929.)

1. **Actions D a—Action is commenced from issuance of summons.**

   The commencement of a civil action is at the time of the issuance of the summons, from which time the action is pending.

2. **Municipal Corporations J a—Allegation of demand upon and refusal of city to bring action not necessary in this case.**

In an action by a taxpayer, in behalf of himself and others, to vacate and set aside a deed to the city by a cemetery association on the ground of collusion and fraud between the association and the two commissioners who since have been succeeded by others, but were in office at the time of the issuance of the summons: *Held*, as the city officials were in office when the action was commenced the service was proper, and an allegation of demand upon and refusal of the city to bring suit was not required.

3. **Same—Plea in Bar.**

Held, upon the facts of this case, the defendant's plea in bar was properly overruled with leave to file answer.

APPEAL by defendants from *Sink, Special Judge,* at April Special Term, 1928, of BUNCOMBE. Affirmed.

Marcus Erwin and Alfred S. Barnard for plaintiff.
George Pennell, Mark W. Brown and Carter & Carter for defendants.

ADAMS, J. The original summons was issued 16 May, 1927, and served on all the defendants therein named on 20 May, 1927. Among these defendants were John H. Cathey and Frank L. Conder, officers of the city, who constituted a majority of the city board of commissioners. Neither the City of Asheville nor the French Broad Cemetery Company was a party, but each of them was afterwards made a party defendant by an order of court. The summons against these two defendants was issued 23 May, 1927, and served the day following. The date of its issuance was the day before Cathey and Conder retired from office—the day before they were succeeded respectively by Roberts and Rogers.

The plaintiff, suing on behalf of himself and other taxpayers, filed a complaint setting up two causes of action. His object was to vacate and set aside a deed conveying land to be used as a cemetery, executed on 4 March, 1927, to the City of Asheville by the French Broad Cemetery Company. The gravamen of the action is fraud and collusion in effecting the sale between Cathey and Conder as officers of the city and the officers and stockholders of the Cemetery Company. For the purpose of barring the prosecution of the action the defendants alleged that the summons was served on the city within the space of a few minutes after the oath had been administered to the officers succeeding Cathey and Conder, and that it was not served on the city while Cathey and Conder were in office. Upon these facts the defendants submit the legal proposition that the action cannot be maintained in the absence of an allegation in the complaint that the plaintiff had requested the governing body of the city to take such action as was necessary to vacate and cancel the deed and that such action had not been taken. Whether such request was necessary is the question for decision. The controlling principle is enunciated in the authorities cited in *Murphy v. Greensboro,* 190 N. C., 268, 275. An allegation that the city refused to bring suit is not necessary if the request to bring it was not required. Such request was not required if at the time the suit was brought the corporate management was in control of the officers who are said to have connived with the officers and stockholders of the Cemetery Company. *Murphy v. Greensboro, supra,* 276, and citations. That they were in control when the summons was issued is admitted.

A civil action is commenced when the summons is issued and, as the statute fixes the inception of the action, suit is pending from that time and not exclusively from the time when the summons is served. C. S., 475; *Pettigrew v. McCoin,* 165 N. C., 472; *Morrison v. Lewis, ante,* 79. As the city officials who are charged with the alleged wrong were in office when the action was commenced an allegation of a demand upon the city and the city's refusal to bring suit was not required. The cases of *Harrison v. New Bern,* 193 N. C., 555, and *White v. Hickory,* 195 N. C., 42, cited by the appellants, were decided upon facts which differ in material respects from those appearing in the present appeal.

Judge Sink overruled the plea in bar and gave leave to the city to file an answer. In our opinion his judgment is free from error and should be

Affirmed.

CHAS. R. BRIGGS AND WIFE, CLARA SILVIS BRIGGS, v. THE INDUSTRIAL BANK OF RICHMOND, JOHN D. BROWN AND G. C. HAMPTON, JR., TRUSTEE.

(Filed 24 April, 1929.)

Quieting Title A a—Usurious charge on notes secured by mortgage not ground for suit to remove cloud on title to extent of interest.

An usurious charge of interest on notes does not affect the validity of the mortgage or deed of trust securing them, C. S., 2306, and a suit brought to remove a cloud upon title to the lands under the provisions of C. S., 1743, to the extent of the usurious charge of interest on the notes cannot be maintained.

CIVIL ACTION, before *Moore, Special Judge,* at October Term, 1928, of GUILFORD.

Plaintiffs allege that on 15 August, 1927, they borrowed from the defendant bank the sum of $1,700, but that said defendant required them to execute sixty notes in the sum of $42.50 each, payable on the first day of each month until the entire sum had been discharged; that in order to secure the payment of said notes plaintiffs executed and delivered to the individual defendants a deed of trust upon certain land in Guilford County. Plaintiffs further allege that they had paid twelve monthly installments of $42.50 each, and that the transaction was usurious in that the sum of $658.18 represented money in excess of the legal rate and the penalty allowed by law. Plaintiffs demand judgment "that the sum of $658.18 of the aforesaid deed of trust and notes be adjudged to be usurious and void; that the same be declared a cloud upon the title of plaintiffs and be canceled and removed; that the amount which is due upon said notes and deed of trust be adjudged to be $1,190, payable monthly at the rate of $42.50 per month, without interest," etc.

The defendants demurred to the complaint upon several grounds, and in particular that the complaint did not state a cause of action for removing the cloud upon the title of plaintiffs.

The trial judge sustained the demurrer, and the plaintiffs appealed.

Thomas J. Hill for plaintiffs.
Shuping & Hampton for defendants.

BROGDEN, J. If a note secured by a mortgage or deed of trust is tainted with usury, can the makers thereof have the usurious element adjudged a cloud upon the title and removed under the provisions of C. S., 1743?

The remedy prescribed by law for usurious transactions is thus stated in *Ripple v. Mortgage Corp.,* 193 N. C., 422, 137 S. E., 156. "In North Carolina the penalty, as prescribed by statute, for taking, receiving, reserving, or charging for the use of money a sum in excess of interest at the legal rate is forfeiture of the entire interest which the note or other evidence of debt carries with it, or which has been agreed to be paid. The forfeiture will be enforced against the usurer, when he seeks to recover upon the usurious contract or transaction. His debt will be stripped of all its interest-bearing quality, and he will be permitted to recover only the principal sum loaned. If a sum in excess of interest at the legal rate has not only been charged by the lender, but has also been paid by the borrower for the use of money, then the person, or his legal representative, or the corporation by whom the same has been paid, may recover twice the amount paid in an action in the nature of action for debt." C. S., 2306.

It is manifest that the note is not a cloud upon title. The cloud, if any, is formed by the mortgage or deed of trust. It was formerly held in *Glisson v. Newton,* 2 N. C., 336, that a bond tainted with usury was utterly void "as is also every security or assurance founded upon it." But the statute in force in 1796 when the decision was rendered, contained express provision to that effect. *Shober v. Hauser,* 20 N. C., 222.

In construing the present statute upon the subject of usury it has been held that the usury complained of did not affect or impair the obligation and validity of the mortgage or deed of trust securing the note. Thus, in *Spivey v. Grant,* 96 N. C., 214, 2 S. E., 45, the Court declared: "Nor can the change in the rate of interest, assented to by him, made in the deed, impair its force as to him. Had it remained, it would have only affected the obligation to the extent of the interest, not the conveyance as a valid act." To the same effect is the utterance in *Rogers v. Booker,* 184 N. C., 183, 113 S. E., 671. "The usury did not impair the validity of the mortgage, and only forfeits the interest."

Plaintiffs do not contend that the deed of trust is entirely invalid, but that it is partially so. C. S., 1743, does not apply to such a fact situation. The statute was intended to remove clouds not merely to determine their size.

Affirmed.

MRS. M. W. GANT v. THE PROVIDENT LIFE AND ACCIDENT INSURANCE COMPANY OF CHATTANOOGA, TENNESSEE.

(Filed 24 April, 1929.)

1. **Insurance E b—Construction of insurance contract in general.**

   The rule that a liberal construction of ambiguous language will be given in favor of the insured has no application when the words employed clearly express the terms upon which the policy has been issued.

2. **Insurance R a—Construction of policy of accident insurance as to the risks covered.**

   When a policy of accident insurance limits the liability of the company to injuries caused the insured by being struck by a moving automobile, its plain and unambiguous meaning will not be extended in favor of the insured to cover an injury caused by being struck with a plank hurled against her by a revolving wheel of an automobile.

3. **Trial D c—Nonsuit properly granted when evidence does not establish liability of defendant.**

   Where the only evidence in an action upon an accident insurance policy tends to show that the defendant was not responsible under the terms of the policy, the defendant's motion as of nonsuit is properly granted.

APPEAL by defendant from *Shaw, J.,* at August Term, 1928, of GUILFORD. Reversed.

This is an action to recover on an automobile accident policy of insurance issued by defendant to plaintiff on 6 February, 1923, and in force on 10 January, 1927. The policy provides for the payment by defendant to plaintiff of a stipulated sum of money, as indemnity, for the loss of life or limb, of sight or time, by accidental means; the liability of defendant, however, is expressly limited by the language of the insuring clause in said policy.

By said policy defendant insured plaintiff "against the effects resulting exclusively of all other causes from bodily injury sustained by the insured during the life of this policy solely through external, violent and accidental means (excluding suicide while sane or insane, or any attempt thereat while sane or insane) and which bodily injury is sustained by the insured as the result of operating, driving, riding in or on, adjusting or cranking an automobile, or of being struck, run down or run over by a moving automobile, or caused by the burning or explosion of an automobile."

The evidence at the trial tended to show that on 10 January, 1927, plaintiff was struck by a plank which was thrown against her by the revolving wheel of an automobile; the plank struck the plaintiff on her leg, thereby causing her a serious bodily injury. At the time she was struck by the plank plaintiff was standing in the yard of her home in Greensboro, N. C., at a distance of 12 or 15 feet in the rear of the automobile. No part of the automobile struck, or came in contact with the person of plaintiff.

Plaintiff's husband had undertaken to drive the automobile from his garage to the street, in front of his home; the driveway, running from the garage to the street, was covered with snow, 15 to 17 inches deep. After the automobile had been driven from the garage, and while it was on the driveway, the rear wheels began to spin, because of the snow on the driveway. This caused the automobile to skid. To prevent the wheels from spinning and the automobile from skidding, plaintiff's husband directed a servant to place a plank under each of the rear wheels. When this had been done, the wheels passed over the planks underneath them. As the left rear wheel passed over the plank, which had been placed under it, the plank was hurled by the revolving wheel, with great force, toward the plaintiff, who at the time was standing in the rear of the automobile. This plank struck the plaintiff and caused the injury to her leg. Because of the injury, plaintiff was taken at once to a hospital, where she remained for thirty-five days, under the care of physicians and surgeons. Since her return to her home from the hospital plaintiff has been unable, because of her injury, to resume the performance of her household duties.

Issues were submitted to the jury, and answered as follows:

"1. Was the plaintiff struck by a moving automobile, within the terms of the policy of insurance, as alleged in the complaint? Answer: Yes.

2. Did the plaintiff on said occasion expose herself to unnecessary danger? Answer: No.

3. What amount, if any, is plaintiff entitled to recover of defendant? Answer: $635, with interest from 15 July, 1927."

From judgment on the verdict defendant appealed to the Supreme Court.

Shuping & Hampton for plaintiff.
Brooks, Parker, Smith & Wharton for defendant.

CONNOR, J. Only one question is presented for decision by defendant's several assignments of error on this appeal: Was the bodily injury, which all the evidence shows was sustained by her on 10 January, 1927, the result of plaintiff "being struck . . . by a moving automobile"? Unless this question can be answered in the affirmative, it must be conceded that plaintiff cannot recover in this action. Defendant is liable to plaintiff only under the terms of the policy; if the injury which she sustained is not included within the terms of the policy, plaintiff cannot recover.

There was no evidence at the trial tending to show that plaintiff in fact was struck by a moving automobile, and thereby injured; all the evidence tended to show that she was struck by a plank. Can the language of the policy be so construed by the court that it may be held, upon all the evidence, as a matter of law, that plaintiff was struck by a moving automobile, because the evidence shows that she was struck by a plank which was thrown against her by the revolving wheel of an automobile?

If the language of the policy is uncertain or ambiguous, and is susceptible to more than one construction, the court will adopt and apply that construction which is most favorable to the insured. If, however, there is no uncertainty or ambiguity in the language of the policy, there is no occasion for judicial construction; the rights and liabilities of the parties must be determined in accordance with the plain, ordinary, and popular sense of the language which they have used in their contract. *Penn v. Insurance Co.,* 158 N. C., 29, 73 S. E., 99.

In the instant case the liability of the defendant under the policy which plaintiff accepted, is expressly limited by language which is free from uncertainty or ambiguity. This language, therefore, cannot be so construed as to enlarge defendant's liability, in order that plaintiff may recover upon the facts shown by the evidence. As there was no evidence from which the jury could find that plaintiff was injured by "being struck by a moving automobile," we must hold that there was error in the refusal of the court to allow defendant's motion, at the close of the evidence, that the action be dismissed as upon nonsuit. To the end that the action may be dismissed, in accordance with this opinion, the judgment is

Reversed.

STATE v. GEORGE DALTON.

(Filed 24 April, 1929.)

Criminal Law G c—Right to impeach credibility of defendant's testimony.

Where a defendant in a criminal action testifies in his own behalf the credibility of his testimony is subject to impeachment, and it is competent for the State to ask him on cross-examination whether there was then a warrant out for him from the Federal Court, when relating only to his credibility as a witness.

APPEAL by defendant from *Shaw, J.,* and a jury, at Fall Term, 1928, of STOKES. No error.

The bill of indictment charged the defendant with (1) the manufacture of intoxicating liquors; (2) having intoxicating liquors in his possession; (3) having intoxicating liquors in his possession for the purpose of sale. The jury rendered a verdict of guilty "in manner and form as charged in the bill of indictment."

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

W. Reade Johnson for defendant.

CLARKSON, J. The defendant, George Dalton, was a witness in his own behalf. On cross-examination the following question was asked him: "Q. There is a warrant out for you now from the Federal Court against you?" The defendant objected; the objection was overruled and the defendant excepted and assigned error. The defendant answered "Yes, I guess there is." This is the sole assignment of error in the record.

This matter was thoroughly discussed in *S. v. Maslin,* 195 N. C., at p. 540. In that case, on cross-examination, for the purpose of impeachment, the defendant was asked whether he was then under indictment for abstracting and embezzling funds belonging to the Merchants Bank and Trust Company, for the embezzlement of trust funds deposited in the same bank by the Snipes estate, and for receiving into the bank certain moneys for deposit when he knew the bank was insolvent. His objection to each question was overruled and to each, reserving his exceptions, he gave an affirmative answer. In that case it was held that the questions were competent.

In the case of *S. v. Wiggins,* 171 N. C., 813, the question asked, "If he had not been accused of stealing a certain person's hogs," was properly excluded. Note the question was not whether he had been convicted.

A warrant is issued from a court and has to be sworn to. We think the evidence competent. *S. v. Jeffreys,* 192 N. C., 318.

No error.

MARY SCHWARBERG, ELIZABETH SCHWARBERG AND ELIZABETH M. PETTES v. E. M. HOWARD, V. L. COLE AND UNITED STATES LAND COMPANY.

(Filed 24 April, 1929.)

Appeal and Error E a—Complaint is necessary part of record proper.

Under Rule 19, section 1, the complaint is a necessary part of the record proper, and when it is not contained therein, the case on appeal will be dismissed.

APPEAL by defendants from *Stack, J.,* at September Term, 1928, of MOORE.

Johnson & Johnson for plaintiffs.
J. A. D. Parrish and L. B. Clegg for defendants.

STACY, C. J. It appears from the statement of case on appeal, which constitutes the entire record sent to this Court, that summons in an action entitled as above, was issued out of the Superior Court of Moore County 29 March, 1928, and that thereafter, 25 July, 1928, two of the defendants, E. M. Howard and United States Land Company, through their counsel, entered a special appearance and move, first, that the action be dismissed for want of proper service as to them; and, second, that the action be moved to Carteret County for trial, if not dismissed. Both motions were overruled and the defendants appeal. The complaint is not sent up as a part of the record as required in all cases, and we are not able to determine the nature and character of the action.

It is provided by Rule 19, sec. 1, of the Rules of Practice in the Supreme Court that "the pleadings on which the case is tried, the issues and the judgment appealed from shall be a part of the transcript in all cases." 192 N. C., p. 847. The appeal, therefore, must be dismissed for failure to comply with the rules, or to send up the necessary parts of the record proper. *S. v. McDraughon,* 168 N. C., 131, 83 S. E., 181; *Cressler v. Asheville,* 138 N. C., 482, 51 S. E., 53; *Sigman v. R. R.,* 135 N. C., 181, 47 S. E., 420; *Jones v. Hoggard,* 107 N. C., 349, 12 S. E., 286.

As to whether the defendants did not waive their special appearance and enter a general appearance by moving for change of venue as a matter of right, see *Motor Co. v. Reaves,* 184 N. C., 260, 114 S. E., 175.

Appeal dismissed.

MRS. T. D. JONES, SOUTHGATE JONES, J. L. MOREHEAD, W. L. FOUSHEE, A. D. MATTHEWS, MRS. J. N. GORMAN, EDITH MATTHEWS, AND B. B. MATTHEWS v. CITY OF DURHAM.

(Filed 24 April, 1929.)

1. **Municipal Corporations G b—Railroad right of way properly included in lineal feet necessary in petition for street improvements.**

The right of way of a railroad company abutting on a street proposed to be improved by a city is properly included in the lineal feet in the petition for improvement under the provisions of C. S., 2707, requiring that a petition for local improvements shall be signed by at least a majority of the owners representing at least a majority of all the lineal feet of frontage upon the street, etc., proposed to be improved.

2. **Municipal Corporations G d—Procedure of owners objecting to assessments.**

The remedy of owners of property abutting upon a street proposed by petition to be improved, assessing the land of such owners, is given by statute, C. S., 2714, providing them an opportunity to be heard, and the right of appeal to the Superior Court by giving notice of appeal within ten days after confirmation by the municipal authorities, and when this has not been done, and the work has been completed, injunctive relief against the collection of the assessments by the city will not lie.

3. **Same—Findings of municipal authorities that petition is signed by proper number of owners is final.**

Where the municipal authorities have approved the petition of owners of land abutting upon a street proposed to be improved in accordance with the provisions of statute, their approval and order for the improvements to be made is final, except where it appears from the face of the petition, as a matter of law, that the signers do not represent a majority of the owners or of the lineal feet required by statute.

4. **Municipal Corporations G a—Power of City to Aid or Contract for paying street assessments.**

Where a railroad company by proceedings in mandamus has been compelled to construct an underpass for a street crossing, the city has the power to sign an agreement in the proceedings obligating itself to pay for street improvements along the underpass, and where this has been done the city may accept the signature of the railroad company to a petition to improve the street as an owner of lineal feet abutting thereon and to pay the part assessed against such right of way for the improvements, and where the relevant provisions of the statutes in regard to street improvements have been complied with this furnishes no evidence of fraud. C. S., 2705, 2706, 2708, 2709, 2710, 2711, 2712, 2713, 2714.

APPEAL by plaintiffs from *Devin, J.*, at Chambers, in Durham, N. C., in September, 1928. Affirmed.

This is an injunctive proceeding brought by plaintiffs against defendant to restrain it from collecting certain street assessments. The court below found the facts and rendered judgment in favor of defendant. The findings of facts are carefully set forth at some length and unnecessary to repeat here in full.

Briefly: (1) A writ of mandamus was brought by the city of Durham *v.* Southern Railway Company and other railroads to compel them to construct an underpass with proper approaches thereto in the city of Durham, to eliminate and abolish a dangerous grade crossing at Chapel Hill Street. The judgment rendered in the lower court was sustained by this Court—185 N. C., 240, and sustained by the U. S. Supreme Court, 69 L. Ed., 231 (266 U. S., p. 178).

(2) The judgment in the writ of mandamus set forth: *"The city of Durham agrees to do all underground work such as the relaying and replacing of water, gas and sewerage mains, street paving including curbs and gutters and also sidewalks."*

(3) The railroads, in accordance with the terms of the judgment, built the underpass and approaches at the cost of some $254,000.

(4) After the underpass and approaches were built, W. P. Budd, who was interested in a lot on the east approach of the said Chapel Hill Street underpass, circulated a petition for the street improvement area under the provisions of chapter 56, Laws 1915, and amendments. The total lineal feet within the local improvement area was 2893.30 feet. Budd obtained a total of 1334.80 feet. Later the Southern Railway Company signed, making a total of 2051.20 feet (the addition in the record is incorrect, but immaterial), leaving unsigned 842.10 feet, which made a majority of the lineal feet with the signature of the Southern Railway Company which was 716.40 feet. There were seventeen property owners, all except five signed the petition. Thus the petition had a majority of lineal feet and owners in the street area to be paved.

(5) The clerk's report showing the frontage signed and unsigned by the property owners, with the original petition, was submitted to the mayor and city council. A resolution setting forth in detail the whole matter was by a unanimous vote adopted by the mayor and city council

on 16 August, 1926, and a resolution made at the same meeting ordering the paving and making the assessments. These resolutions were published as required by law in the *Morning Herald,* a newspaper published in the city of Durham.

(6) The city council, the governing body of the city of Durham, did not cause to be placed upon the minute books of the city council of the city of Durham any record, by resolution or otherwise, of the contract or agreement between the city of Durham and the Southern Railway Company, by the terms of which the city of Durham was to assume and pay the assessment to be charged against the Southern Railway Company and the North Carolina Railroad Company, the lessor of the Southern Railway Company. The city council of the city of Durham did not cause to be made any record on the minute books of the city of Durham, of the payment, or the authority to pay, the assessment of the city of Durham, against the Southern Railway Company and the North Carolina Railroad Company. The only record of the agreement between the city of Durham and the Southern Railway Company with respect to the signing of a petition by the Southern Railway Company and with respect to the assumption and payment of the amount assessed against the Southern Railway Company is contained in the file of R. W. Rigsby, city manager, the files of S. C. Chambers, city attorney, which the plaintiffs did not see or know of prior to the beginning of this action, and the words "assumed by city" after the name of the Southern Railway Company in the assessment roll. Upon the completion of the improvements under said petition due notice was given of a public hearing on the adoption of the assessment roll, which hearing was set for and held on 28 February, 1927, in the city hall of the city of Durham, when and where interested persons were given an opportunity to be heard relative to said assessments. There was no objection to the assessment roll and it was adopted at 7:40 p.m., on 28 February, 1927, which is in words and figures as follows: "Street Assessment Roll: Chapel Hill Street from Main Street to Duke Street and Great Jones Street from Main Street to Chapel Hill Street. Total yardage 6,619.2. Total cost $25,784.98; property owners assessment $16,298.06."

Then is set forth the frontage of each property owner and the amount due by each for the improvement. The charges against the frontage in the rate set forth in the assessment roll represents a charge of two-thirds against the property owners and one-third against the city of Durham. In the case of the Southern Railway Company, the city assumed the assessment. On 22 March, 1927, the city of Durham paid to the city tax collector by warrant the assessments against the Southern Railway Company and the North Carolina Railroad Company in the sum of $4,062.70. None of the plaintiffs knew of the provisions of the judgment in the case of the city of Durham *v.* Southern Railway Company, Norfolk and Western Railway Company and the Seaboard Air Line Railway Company, until after the said assessment roll was completed and adopted, and until a short time prior to the beginning of this action. None of the plaintiffs knew of the agreement between the city of Durham and the Southern Railway Company, in which the city of Durham assumed the payment of the said assessments against the Southern Railway Company and the North Carolina Railroad Company until after the said assessment roll was completed and adopted, and until a short time prior to the beginning of this action. The plaintiffs did not object to the proceedings of the city of Durham in respect to these assessments, because they relied upon the good faith of the officials of the city of Durham and upon the truthfulness of the published proceedings of the city of Durham, in respect to the said local improvements under the provisions of chapter 56, Public Laws 1915. The plaintiffs allege in their affidavits that had they known of the provisions of the said judgment or of the agreement between the city of Durham and the Southern Railway Company, concerning the manner in which the said petition was signed by the Southern Railway Company, they would have objected to the filing of the said petition, the adoption of the assessment roll and all other proceedings incident thereto and appealed from any action by the city of Durham tending to charge these plaintiffs with the costs of the said improvements.

This injunctive proceeding was instituted 9 August, 1928, after the plaintiffs had notice under the statute and the work was completed.

The court rendered the following judgment: "Upon the foregoing findings of fact; it is ordered, considered and adjudged, that the city of Durham was acting in the public interest in providing safe and convenient public streets under authority conferred by chapter 56, Public Laws 1915, as amended, and that the petition praying for such improvement is proper and regular on its face and all notices required by law were duly given and that the plaintiffs had full opportunity to appear and protest when the assessments were subsequently made, which they failed to do. Further, that by and under the terms of the judgment entered in the case of city of Durham *v.* Southern Railway Company, Seaboard Air Line Railway Company and Norfolk and Western Railway Company, in which the city agreed to do the paving, the city of Durham had a right to require said Southern Railway Company to sign such petition for the frontage occupied by its right of way, and when so signed, the governing body of the city had a right to consider such signatures in determining the sufficiency of said petition, and in so acting and in the doing of the work thereunder and in confirming the assessments in connection with such work, such assessments are not void by reason of fraud or other cause, and such assessments as have not been paid are valid and subsisting liens against the several parcels of land; it is further, ordered, considered and adjudged, that the restraining order heretofore made in this cause be, and the same is hereby dissolved, provided that the dissolution shall not take effect pending any appeal to the Supreme Court."

The plaintiffs duly excepted, assigned errors and appealed to the Supreme Court upon the following grounds: (1) To the refusal of the court to grant the restraining order prayed for, and to the dissolution of the injunction as set out in the judgment; (2) to the action of the court in signing the judgment set out in the record.

McLendon & Hedrick, J. L. Morehead, Brawley & Gantt and W. L. Foushee for plaintiffs.

S. C. Chambers and P. C. Graham for defendants.

CLARKSON, J. *Question involved:* (1) Will a local improvement petition, required by C. S., 2707, signed by the Southern Railway Company, an abutting owner, which made a majority of all the lineal feet frontage (no question as to their being a majority in number of the owners), the assessment against said railway the city of Durham assumed to pay in a mandamus proceeding to force said railway and others to build an underpass, render an assessment thereunder void as to other abutting property owners in the area who did not sign but had notice of the proceeding, under C. S., 2705, 2712? We think not. See Public Laws 1915, chap. 56, sec. 5; C. S., 2703 *et seq.*

C. S., 2707, is as follows: "The petition for a local improvement shall be signed by at least a majority in number of the owners, who must represent at least a majority of all the lineal feet of frontage of the lands (a majority in interest of owners of undivided interests in any piece of property to be deemed and treated as one person for the purpose of the petition) abutting upon the street or streets or part of a street or streets proposed to be improved. The petition shall cite this article and shall designate by a general description the local improvement to be undertaken and the street or streets or part thereof whereon the work is to be effected. The petition shall be lodged with the clerk of the municipality, who shall investigate the sufficiency thereof, submit the petition to the governing body, and certify the result of his investigation. The determination of the governing body upon the sufficiency of the petition shall be final and conclusive."

In construing this section, this Court said in *Gallimore v. Thomasville,* 191 N. C., at p. 650: "The statute, C. S., 2707, provides that the determination of the governing body upon the sufficiency of the petition for local improvements shall be final and conclusive. In *Tarboro v. Forbes,* 185 N. C., 59, this Court held that where it appears upon the face of the petition, as a matter of law, that the signers of the petition do not represent a majority of the lineal feet of the total frontage on the street, proposed to be improved, the determination of the governing body as to the sufficiency of the petition is not final or conclusive. In that case, the petition was held insufficient to support assessments, because it appeared upon the face thereof and from the order of the board of town commissioners, that the lineal feet of the frontage of the 'Town Common' had been excluded in determining the total of the frontage on the street, proposed to be improved. It was held that said frontage should have been included, as a matter of law, and that inasmuch as the total number of signers did not represent a majority of the lineal feet of frontage, including the frontage of the 'Town Common,' the petition was not sufficient. . . . *(Gallimore case.)* As to whether the number of persons owning lands fronting on said street was twenty-five or twenty-six involves only a question of fact; insofar as the sufficiency of the petition, authorized to be filed under C. S., 2707, involves only questions of fact, the determination of the governing body, in the absence of fraud, and when acting in good faith, is final and conclusive. . . . The fact that there were twenty-six, and not twenty-five, persons who owned the lands fronting on the street proposed to be improved, was not called to the attention of the city council until after the improvements had been made and the expense for the same been incurred. The sufficiency of the petition could not then be called into question for that a majority of the landowners had not signed same. That fact had been conclusively determined by the city council, acting in good faith, before the improvements had been ordered."

In *City of Charlotte v. Brown,* 165 N. C., 435, it is held: "Where a municipality levies a special tax for street improvements upon the land of an abutting owner in excess of that allowed by a statute applicable, the excess is a nullity and may be enjoined; and where the limitation prescribed is a certain per cent of the taxable value of the property, that valuation must control, whether the property lies upon one or several streets." *Winston-Salem v. Coble,* 192 N. C., 776; *Winston-Salem v. Ashby,* 194 N. C., 388; *Flowers v. Charlotte,* 195 N. C., 599. In the above cases the matter was jurisdictional and the proceeding void and the remedy by injunction permissible.

C. S., 2714, is as follows: "If a person assessed is dissatisfied with the amount of the charge, he may give notice within ten days after such confirmation that he takes an appeal to the next term of the Superior Court of the county in which the municipality is located, and shall within five days thereafter serve a statement of facts upon which he bases his appeal, but the appeal shall not delay or stop the improvements. The appeal shall be tried at the term of court as other actions at law."

Under this section if the plaintiffs desired to attack the assessment when levied against their property, the statute gives the remedy. *Brown v. Hillsboro,* 185 N. C., 368; *Gunter v. Sanford,* 186 N. C., 452; *Leak v. Wadesboro,* 186 N. C., 683; *Mfg. Co. v. Commissioners of Pender,* 196 N. C., 744.

C. S., 2705, provides publication of resolution or notice. C. S., 2706, when petition required; 2708, what resolution shall contain; 2709, character of work and material; 2710, assessments levied; 2711, amount of assessments ascertained; 2712, assessment roll filed, notice of hearing; 2713, hearing and confirmation, assessment lien.

Everything was done by defendant as required by the statute. The court below found as a fact that "the plaintiffs had full opportunity to appear and protest when the assessments were subsequently made, which they failed to do." The work was done after plaintiffs had notice as required by the statute. The whole matter, on the face, was regular and in compliance with the statute. Plaintiffs' remedy, if they had any, was under C. S., 2714. They cannot now complain. The proceeding was not void.

In *Charlotte v. Alexander,* 173 N. C., 515, it is held: "Abutting property owners who have contracted with a municipality that the latter exceed its statutory authority in assessing their lands beyond a certain per cent of their value for street improvements, and to give it a written waiver of such rights, are estopped to deny the validity of the contract by accepting its benefits, and the 'waivers,' when obtained, are enforcible by the municipality." *In re Assessment v. R. R.,* 196 N. C., 756.

Question two: Did the Southern Railway Company, an abutting owner in the area, have the right to sign the petition and rely on the city of Durham to perform its agreement with said railway to pay for same in the mandamus proceeding against said railway requiring it and others to build an underpass? We think so.

The Municipal Finance Act, C. S., 2942(r), implies not only that a city may bear a part of the expense incident to the elimination of grade crossings, but may issue bonds therefor, this section providing that bonds may be issued by a city as follows, for that purpose: "The elimination of any grade crossing or crossings and improvements incident thereto, thirty years." *R. R. v. Goldsboro,* 155 N. C., at p. 362; *Durham v. R. R.,* 185 N. C., at p. 245. The agreement was legal and binding on the city of Durham.

In the mandamus proceeding the judgment contained the following: "The city of Durham agrees to do all underground work, such as the relaying and replacing of water, gas and sewerage mains, *street paving* including curbs and gutters and also sidewalks." This agreement was binding on the city of Durham. It had the power to make it. This agreement was part of the judgment in the mandamus proceeding which required the underpass to be built by the railroads. See *Argentine v. Atchison, etc., R. R.,* 30 L. R. A., p. 255; *Woodruff v. Catlin,* 54 Conn., 277; *Westbrook's App.,* 57 Conn., 95; *Fairfield's App.,* 57 Conn., 167; *N. Y. & N. E. R. Co.'s App.,* 58 Conn., 532; and cases cited in the notes to the case of *Kelly v. Minneapolis,* 26 L. R. A., 92.

Third question: Was there any fraud practiced by the municipality? We think not.

The court below found "the city of Durham had a right to require said Southern Railway Company to sign such petition for the frontage occupied by its right of way, and when so signed, the governing body of the city had a right to consider such signatures in determining the sufficiency of said petition, and in so acting and in the doing of the work thereunder and in confirming the assessments in connection with such work, such assessments are not void by reason of fraud or other cause, and such assessments as have not been paid are valid and subsisting liens against the several parcels of land."

44 C. J., sec. 3297(7), is as follows: "In accordance with general principles it has been held that an assessment may be vacated or set aside, or its enforcement enjoined, by reason of fraud on the part of the municipal authorities making the assessments." *Gallimore, supra.*

We can see no evidence of fraud in the matter. The mandamus proceeding required the railroads to build the underpass, the city of Durham to pay the street paving. As heretofore stated, the city of Durham had the legal right to make this agreement. This judgment was affirmed on appeal to this Court and the U. S. Supreme Court. The railroad was an abutting owner and signed the petition at the request of the authorities of the city of Durham, knowing the city was liable under the judgment to pay for the street paving. Plaintiffs cannot complain, they are paying for exactly what they get—the street paved which abuts on their property. The Southern Railway gets what the city agreed to do after the underpass was built—the street paved which abuts on its property. The only complaint that plaintiffs might have was the fact that the city of Durham must increase its general tax a little by the city paying for paving the street abutting on the Southern Railway Company's property. It had a right, in its discretion, to make this agreement. In fact the enormous cost in building the underpass justified this minimum sum compared to the cost to the railroads. We can see no legal or equitable grounds for plaintiffs' not paying for their street assessments. The judgment below is

Affirmed.

STATE v. J. I. PALMER.

(Filed 24 April, 1929.)

1. **Homicide C a—one killing another through reckless driving of automobile is guilty of manslaughter.**

One driving an automobile on a public highway while drunk, recklessly and in disregard of statutes for the regulation of automobiles thereon, resulting in death to another, is guilty at least of manslaughter without reference to whether he intended to inflict injury or not.

2. **Same—Negligence of deceased does not excuse of guilt unless it was sole proximate cause.**

One may not be convicted for driving an automobile upon a public highway in violation of safety statutes when the negligence of the injured person is the sole proximate cause of the injury, but it is otherwise if the concurring negligence of both combined was the proximate cause.

3. **Same—If defendant's negligence causes death his later acts to avoid injury do not relieve him of guilt.**

Where the injury to another would not have occurred except for the criminal negligence of the defendant in violating the safety statutes regulating the operation of automobiles upon the public highway, he is not relieved of guilt by the fact that he did all that he reasonably could to avoid the injury at the time of the occurrence under the existing conditions, provided his inability to stop was due to his prior recklessness.

4. **Homicide C c—Evidence of reckless driving.**

Evidence that the defendant while driving on a public highway stopped at a filling station and came out with a bottle of whiskey, from which he took two or three drinks, and that later one of the passengers got out of the automobile because of fear of the defendant's reckless driving, is admissible as substantive evidence and also as corroborative of other evidence of his reckless driving in a prosecution for manslaughter.

APPEAL by defendant from *Shaw, J.*, at November Term, 1928, of DAVIDSON. No error.

The defendant was indicted with Otis Cross and Will Hargrave for the unlawful killing of one C. A. Misenheimer on 13 October, 1928. Pending the trial a *nol. pros.* was entered as to the defendant Hargrave and a verdict of not guilty as to the defendant Cross.

According to the evidence for the State the defendant on the night of 13 October, 1928, was driving a Dodge sedan about a mile south of Thomasville going in the direction of Lexington and the deceased was driving a Chrysler going towards Thomasville. The two cars met about 10 o'clock on a "rainbow curve." When the collision occurred the left front wheel of the Dodge sedan struck the left side of the Chrysler, knocked off the front wheel and left front door, and shattered the glass on that side of the car. Misenheimer, who was driving the Chrysler, was killed and two other men who occupied the front seat with him were injured. The Chrysler was on the right-hand side of the black mark in the middle of the road; and after the collision it was seen that the left front wheel was about 12 inches over the pavement, the remainder of the car being off the pavement and on the shoulder of the highway. The left front wheel of the Dodge was down and the hub was in contact with the surface of the road. The Dodge car ran 23 feet after striking the Chrysler, turned over on the left side with the "top back towards Thomasville." Part of it was on the hard surface, the rear being off on the shoulder which was 5 or 6 feet wide. The defendant who was driving the Dodge car was under the influence of intoxicating liquor at the time of the collision and was running his car in disregard of certain statutory requirements.

There was evidence for the defendant tending to contradict the material circumstances on which the State relied for conviction. It is unnecessary to state more minutely the specific circumstances developed by the evidence. The defendant was found guilty of manslaughter, and from the judgment pronounced he appealed upon error assigned.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

Phillips & Bower and Raper & Raper for defendant.

ADAMS, J. The act regulating the operation of vehicles on the highways of this State provides among other things that it shall be unlawful for any person who is under the influence of intoxicating liquor or narcotic drugs to drive any vehicle upon a highway; that any person driving a vehicle on a highway shall drive it at a careful and prudent speed not greater than is reasonable and proper, having due regard to the traffic, surface, and width of the highway, and to any other conditions then existing; that no person shall drive any vehicle upon a highway at such a rate of speed as to endanger the life, limb or property of any person. It is provided that no person shall drive a vehicle on a highway at a rate of speed in excess of 15 miles an hour in traversing or going around curves or traversing a grade upon a highway when the driver's view is obstructed within a distance of 200 feet along the highway in the direction in which he is proceeding; also that the driver of a vehicle shall not drive to the left side of the center line of a highway upon the crest of a grade or upon a curve in the highway, when such center line has been placed upon the highway by the State Highway Commission, and is visible. Public Laws 1927, ch. 148, art. 2, sec. 2, sec. 4(a), sec. 4(b), subsec. 4; sec. 13(d).

There was evidence for the State tending to show that the defendant had violated each of these provisions. In *S. v. Gray,* 180 N. C., 697, 700, it is said: "The principle is generally stated in the textbooks that "if one person causes the death of another by an act which is in violation of law, it will be manslaughter, although not shown to be wilful or intentional" (McClain Cr. L., Vol. 1, sec. 347), or that when life has been taken in the perpetration of any wrongful or unlawful act, the slayer will be deemed guilty of one of the grades of culpable homicide, notwithstanding the fact that death was unintentional and collateral to the act done (13 R. C. L., 843); but on closer examination of the authority, it will be seen that the responsibility for a death is sometimes made to depend on whether the unlawful act is *malum in se* or *malum prohibitum,* a distinction noted and discussed in *S. v. Horton,* 139 N. C., 588. It is, however, practically agreed, without regard to this distinction, that if the act is a violation of a statute intended and designed to prevent injury to the person, and is in itself dangerous, and death ensues, the person violating the statute is guilty of manslaughter at least, and, under some circumstances, of murder. The principle is recognized in *S. v. Horton, supra,* and in *S. v. Turnage,* 138 N. C., 569; *S. v. Limerick,* 146 N. C., 650, and *S. v. Trollinger,* 162 N. C., 620, and has been directly applied to deaths caused by running automobiles at an unlawful speed. In 2 R. C. L., 1212, the author cites several authorities in support of the text that one who wilfully or negligently drives an automobile on a public street at a prohibited rate of speed, or in a manner expressly forbidden by statute, and thereby causes the death of another, may be guilty of homicide; and this is true, although the person who is recklessly driving the machine uses, as soon as he sees a pedestrian in danger, every effort to avoid injuring him, provided that the operator's prior recklessness was responsible for his inability to control the car and prevent the accident which resulted in the death of the pedestrian." This principle is maintained in *S. v. McIver,* 175 N. C., 761; *S. v. Gash,* 177 N. C., 595; *S. v. Rountree,* 181 N. C., 535; *S. v. Jessup,* 183 N. C., 771; *S. v. Sudderth,* 184 N. C., 753; *S. v. Crutchfield,* 187 N. C., 607; *S. v. Lutterloh,* 188 N. C., 412; *S. v. Trott,* 190 N. C., 674. It is perfectly manifest that under these conditions no error was committed in his honor's denial of the defendant's motion to dismiss the action.

On the afternoon preceding the collision the defendant in company with others left Caswell County and went in his car to Reidsville. They left Reidsville at 8 p.m. and after traveling two or three miles stopped at a filling station. There was evidence tending to show that the defendant and another went into the filling station and upon their return to the car the defendant's companion had a pint of whiskey, and that the defendant took two or three drinks. A witness testified that when the car arrived at Monticello he got out of it because he was frightened assigning as a reason therefor "a little too reckless, and a little too fast driving." The defendant excepted to the admission of this testimony; but it was competent as a circumstance which was both substantive and, as the record shows, corroborative of the testimony of other witnesses who said that the defendant was drunk.

The remarks of the solicitor in addressing the jury were his deduction from the evidence and the defendant's exception thereto is without merit.

The defendant excepted to the following instruction to the jury: "If you are satisfied beyond a reasonable doubt from the evidence that the defendant, Palmer, was guilty of culpable negligence as heretofore explained to you by the court, or criminal negligence, and that said criminal negligence was the proximate cause of the death of Misenheimer, why it will be your duty to convict the defendant. If you are satisfied beyond a reasonable doubt from the testimony that the defendant, Palmer, is guilty of criminal or culpable negligence as heretofore explained to you, and that Misenheimer was also guilty of negligence and that the negligence of Palmer and Misenheimer both concurred proximately in producing the death of Misenheimer, then it would be your duty to convict the defendant, Palmer." His Honor further instructed the jury as follows: "But, if you find from the evidence, gentlemen of the jury, that the defendant was guilty of culpable negligence and that Misenheimer was also guilty of negligence, and that Misenheimer's negligence was the proximate cause, sole proximate cause of his death, it will be your duty to acquit the defendant. If you have a reasonable doubt as to whether the defendant was guilty of culpable negligence as heretofore explained to you, it will be your duty to acquit him. Or if you are satisfied beyond a reasonable doubt that the defendant was guilty of culpable negligence, or criminal negligence, as heretofore explained to you, but have a reasonable doubt that such negligence was the proximate cause of the death of Misenheimer, it will be your duty to acquit the defendant. If you are satisfied beyond a reasonable doubt that the defendant is guilty of culpable negligence, and that the deceased, Misenheimer, was also guilty of negligence, and if you find that Misenheimer's negligence was the proximate cause, sole proximate cause of the death of Misenheimer, why then it will be your duty to acquit the defendant." These instructions were strictly in accord with the authorities. In 2 R. C. L., 1213, the principle is thus stated: "The rules of law concerning contributory negligence as a defense in civil actions for damages for personal injuries have no application to homicide cases for criminal negligence in operating an automobile. The decedent's behavior is admissible in evidence, and may have a material bearing upon the question of the defendant's guilt, but if the culpable negligence of the latter is found to be the cause of the death, he is criminally responsible whether the decedent's failure to use due care contributed to the injury or not." This statement of the law has been followed by this Court in *S. v. Gray, supra,* and in *S. v. Oakley,* 176 N. C., 755.

In the trial of this case the defendant was given the advantage of every phase of the law to which he was entitled. We find

No error.

JAMES B. MIDKIFF AND C. L. BRANNOCK v. NORTH CAROLINA HOME INSURANCE COMPANY.

(Filed 24 April, 1929.)

1. **Insurance E b—Conditions in statutory policy of fire insurance are valid and binding.**

The terms and conditions of the standard form of a fire insurance policy, C. S., 6436, 6437, and the stipulations as to a valid waiver thereof are valid and binding on the parties.

2. **Insurance K a—Knowledge of agent of violation of condition of policy at its inception is imputed to his principal.**

Where a policy of fire insurance stipulates that it would not be binding until countersigned by its local agent, the policy is made by the local agent on behalf of the company, and knowledge of the agent of existing conditions contrary to the express provisions of the policy at the inception of the contract is imputed to the company.

3. **Insurance K b—Imputed knowledge of insurer of violation of condition of policy at its inception is a waiver thereof.**

Where the local agent of a fire insurance company, before issuing the policy on a stock of merchandise, knows that included therein are explosives that under the terms of the policy will render it void unless waived in writing attached to its face, and nevertheless the agent issues the policy upon payment of the premium, the knowledge of the local agent is imputed to the company, and the contract being completed the insurer is estopped to deny its liability for a fire loss covered by the policy so issued. It is otherwise if such knowledge is acquired after the policy has been delivered and the contract of insurance completed.

APPEAL by defendant from *Clement, J.,* at August Term, 1928, of SURRY. No error.

This is an action on a policy of fire insurance issued by defendant company to plaintiffs on 6 December, 1926.

The plaintiffs, in consideration of the premium paid by them, were insured by said policy for the term of one year against loss or damage, to an amount not exceeding fifteen hundred dollars, to the property described therein, to wit, store and office furniture and fixtures, and stock of merchandise, consisting principally of hardware, while contained in a building, situate on lot No. 114, on the east side of Main Street, in the town of Mount Airy, North Carolina. The said property was destroyed by fire on 18 December, 1926.

The policy is in the form prescribed by statute (C. S., 6437) and is known as the Standard Fire Insurance Policy of North Carolina. It is provided on the face of the policy that it shall not be valid, unless countersigned by the duly authorized agents of the company, at Mount Airy, N. C. The policy is signed by the president and attested by the secretary of the company. It is countersigned by Sydnor & Sparger, agents of the company, at Mount Airy, N. C.

It is stipulated in the policy, as one of the conditions of defendant's liability thereunder, that "unless otherwise provided by agreement in writing added thereto, this company shall not be liable for loss or damage (d) while there is kept, used or allowed on the described premises, . . . explosives." No agreement in writing was added to said policy with respect to the keeping of explosives on the premises where the property insured by the policy was located.

It is further stipulated in the policy that "No one shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement added thereto, nor shall any such provision or condition be held to be waived unless such waiver shall be in writing added hereto."

It is admitted in the pleadings that at the date of the fire which destroyed the property insured by the policy, dynamite and dynamite caps were kept by plaintiffs on the described premises, as a part of the stock of merchandise described in the policy and insured thereby. There was evidence tending to show that said dynamite and dynamite caps were on said premises, as a part of plaintiffs' stock of merchandise, at the date of the issuance of the policy; that defendant's agents, who solicited plaintiffs to take the policy and who countersigned and issued it, knew at the time the policy became effective that said dynamite and dynamite caps were then kept on the described premises by plaintiffs as part of the stock of merchandise which they proposed to insure; and that with this knowledge said agents issued the policy, and collected from the plaintiffs the premium for the same.

Issues were submitted to the jury and answered as follows:

1. Did the defendant, the North Carolina Home Insurance Company, execute and deliver to the plaintiffs the policy of insurance, as alleged in the complaint? Answer: Yes.

2. Did the plaintiffs carry dynamite and dynamite caps in their stock at the time of the fire? Answer: Yes.

3. If so, did the defendant by its knowledge and conduct waive the printed portions of the policy forbidding the keeping of dynamite and dynamite caps in stock? Answer: Yes.

4. What amount, if any, are the plaintiffs entitled to recover of the defendant? Answer: $1,500, with interest from 18 February, 1927."

From judgment on the verdict, defendant appealed to the Supreme Court.

E. C. Bivens for plaintiffs.
Brooks, Parker, Smith & Wharton for defendant.

CONNOR, J. When a policy of insurance, in the form prescribed by statute (C. S., 6437), and known and designated as the Standard Fire Insurance Policy of North Carolina (C. S., 6436), has been issued by an insurance company and accepted by the insured, and has thereby become effective for all purposes as their contract, the rights and liabilities of both the insurer and the insured, under the policy, must be ascertained and determined in accordance with its terms and provisions. These terms and provisions have been prescribed by statute, and are valid in all respects; they are just both to the insurer and to the insured. Each is presumed to know all the terms, provisions and conditions which are included in the policy. Both are ordinarily bound by them. *Lancaster v. Ins. Co.,* 153 N. C., 285, 69 S. E., 214.

It has, therefore, been held by this Court, that after the policy has been issued by the company and accepted by the insured, and thereby become effective for all purposes as their contract, the provision in the statutory form of the policy that "no one has the power to waive any provision or condition of the policy except such as by the terms of the policy is the subject of agreement added thereto, nor shall any such provision or condition be waived, unless the waiver is in writing added thereto" is valid and will be enforced by the courts of this State. The company will not ordinarily be held to have waived the breach or violation by the insured of a provision or condition of the policy, after the same has become effective as the contract of the parties, where by its terms such breach or violation releases the company from liability under the policy, unless there is a waiver in writing added or attached to the policy. The knowledge of an agent of the company, after the policy has become effective, of the breach or violation by the insured of a provision or condition of the policy will not be imputed to the company, as the basis of a waiver. This principle was applied in *Greene v. Ins.*

Co., 196 N. C., 335, 145 S. E., 616, and in accordance therewith the judgment rendered in the Superior Court on the verdict was reversed. In the opinion in that case it is said: "After a policy has been issued, and has become a valid and binding contract between the parties, knowledge by the agent who issued it, of the breach of a stipulation or condition, which by the express terms of the policy, renders it void, will not be imputed to the company. In such case, forfeiture of the policy, for such breach, can be waived only in accordance with the provisions of the policy. *Smith v. Ins. Co.,* 193 N. C., 446, 137 S. E., 310."

However, it has also been held by this Court that the provision in the statutory fire insurance policy, restricting the power of an agent of an insurance company to waive provisions or conditions, the breach or violation of which renders the policy void or releases the company from liability under the policy, and requiring a waiver in cases where a waiver is permitted by the terms of the policy, to be in writing and added to the policy, does not as a general rule refer to or include conditions existing at the inception of the contract; the provision is applicable only to conditions which arise after the policy has become effective as the contract of the parties. Thus it is said in *Greene v. Ins. Co., supra:* "Conditions with respect to the property insured by a policy of fire insurance existing at the time the policy was issued, and known by the agent of the company, who issued the policy, cannot be relied upon to defeat the liability of the company under the policy, for notwithstanding the provisions of the policy, the knowledge of the agent is imputed to the company. When the policy is issued with such knowledge, it will be held that the company has waived the breach of the stipulation and provisions contained therein, which would otherwise render the policy void, at its inception. In such cases, the doctrine of waiver is applied by the courts upon well settled principles of equity." In *Aldridge v. Ins. Co.,* 194 N. C., 683, 140 S. E., 706, it is said: "It is true that under certain conditions the terms set out in a policy of insurance can be waived only in the manner prescribed by the contract (*Black v. Ins. Co.,* 148 N. C., 169, 61 S. E., 672, 21 L. R. A. (N. S.), 578); but the provisions which usually restrict the agent's power of waiver do not as a rule apply to an agent who has knowledge of conditions existing at the inception of the contract. These conditions may be waived by the agent although embraced in the policy when it is delivered, for in these circumstances the agent's knowledge is the knowledge of the principal. *Smith v. Ins. Co.,* 193 N. C., 446, 137 S. E., 310; *Bullard v. Ins. Co.,* 189 N. C., 34, 126 S. E., 179; *Ins. Co. v. Lumber Co.,* 186 N. C., 269, 119 S. E., 362; *Johnson v. Ins. Co.,* 172 N. C., 142, 90 S. E., 124. Applying this principle to the evidence, neither in the admission of the testimony nor in the instructions to which the exceptions relate have we discovered any sufficient or satisfactory cause for awarding a new trial."

It should be noted that the policy in the instant case, although signed by the president and attested by the secretary of the company, when delivered to the local agent, by its express terms does not become valid, until countersigned by the local agent. The contract with the insured is, therefore, made on behalf of the company by the local agent. As a matter of public policy, and of justice to the insured, it has been uniformly held in this State that knowledge of the local agent with respect to conditions affecting the subject-matter of the policy, existing at the date of its issuance, is imputed to the company. There is no principle of law upon which a court is required to hold that an insurance company, after it has received a premium from the insured for a valid policy, may declare the policy void, and escape liability under its terms, after a loss has occurred, on the ground that the policy was void at the time it was issued because of conditions then existing of which it had full and ample knowledge. In such case, the company is and should be estopped from making a contention to this effect; it is and should be held that the company has, by issuing the policy, with such knowledge, relinquished the right, which it would otherwise have under the terms of the policy, to declare the policy void, and thereby be relieved of liability.

In the instant case, there was evidence tending to show that the local agents of the defendant company, at the time they countersigned and issued to the plaintiffs the policy of insurance, insuring their stock of merchandise, knew that plaintiffs had and kept dynamite and dynamite caps on the described premises, as part of said stock of merchandise, and that with this knowledge they issued the policy. There was no evidence tending to show that the dynamite and dynamite caps on said premises, kept by plaintiffs as part of said stock of merchandise, at the date of the fire, had been added to said stock of merchandise since the issuance of the policy. The knowledge of the local agents, in this instance, was the knowledge of the defendant. It must be held, therefore, that defendant having issued the policy, with knowledge of the presence of the dynamite and dynamite caps on the premises described in the policy, waived this condition, and is estopped to rely upon the presence of the dynamite and dynamite caps, on said premises, at the date of the fire, as releasing the defendant from liability under the policy.

There was no error on the trial of this action in the Superior Court. The testimony of witnesses tending to show that defendant's local agents issued the policy with knowledge that plaintiffs kept dynamite and dynamite caps on their premises, as part of their stock of merchandise at the time the policy was issued, was, upon the facts of this case, competent as evidence. Parol evidence tending to sustain an affirmative answer to the third issue was properly submitted to the jury, under instructions which are in accord with authoritative decisions of this Court. The judgment is affirmed. There is

No error.

J. B. MIDKIFF AND C. L. BRANNOCK, TRADING AS MIDKIFF & BRANNOCK, v. DIXIE FIRE INSURANCE COMPANY AND PALMETTO FIRE INSURANCE COMPANY.

(Filed 24 April, 1929.)

1. **Insurance K a—Knowledge of agent of violation of condition of policy after contract completed not imputed to insurer.**

Knowledge of the local agent of a fire insurance company that the insured kept explosives in his stock of merchandise covered by the policy contract, will not be imputed to the principal, when such knowledge is acquired after the policy has been issued, and where a waiver has not been obtained according to specific provisions of the policy or otherwise sufficient in law, the forfeiture provision of the policy relating thereto will be enforced.

2. **Same—Evidence of knowledge of violation of condition at inception of policy.**

Evidence that merchandise of the class insured usually contained explosives is incompetent to show a waiver of the policy provisions making the policy void in such instances.

APPEAL by plaintiffs from *Clement, J.*, at August Term, 1928, of SURRY. Affirmed.

Two actions by the above named plaintiffs, one against the Dixie Fire Insurance Company, as defendant, and the other against the Palmetto Fire Insurance Company, as defendant, both pending in the Superior Court of Surry County, were, by consent, consolidated for trial.

From judgment of nonsuit in each action, plaintiffs appealed to the Supreme Court.

E. C. Bivens for plaintiffs.
Brooks, Parker, Smith & Wharton for defendants.

CONNOR, J. These actions were begun by plaintiffs to recover on Standard Fire Insurance Policies of North Carolina, issued by defendants to plaintiffs. The policy issued by defendant, Palmetto Fire Insurance Company, is dated 26 August, 1926; the policy issued by defendant, Dixie Fire Insurance Company, is dated 13 September, 1926. Both policies of insurance cover a stock of merchandise, consisting principally of hardware, agricultural implements and machinery, cutlery, guns and pistols, trimmings, wooden ware, tin ware, belting, harness and leather goods, iron, nails, bicycles, furniture, house-furnishing goods, carpets, rugs, pictures, "and all other merchandise not enumerated, not more hazardous, usual to hardware and furniture trade or stores," while contained in a building located on lot No. 114, on the east side of Main Street, in the town of Mount Airy, North Carolina. The property insured by the said policies against loss or damage was destroyed by fire on 18 December, 1926.

At the date of said fire, in violation of a provision or condition contained in each of said policies, plaintiffs had and kept on the premises described in said policies, as part of the stock of merchandise insured thereby, dynamite and dynamite caps. There was no evidence at the trial tending to show that defendants or either of them had waived such violation in accordance with the terms of its policy or otherwise. Neither of the defendants had knowledge at the date of the issuance of its policy that plaintiffs at said date had or kept dynamite as a part of their stock of merchandise. There was no evidence tending to show that the local agent of either of the defendants, who countersigned and issued its policy had such knowledge, at the date of the issuance of the policy. Knowledge of such agents acquired after the policy became effective as the contract of the parties, and while such agents were not acting in behalf of their respective principals, cannot be imputed to defendants.

Knowledge of such agents, at the date of the issuance of the policies, that hardware merchants of Surry County, generally carry dynamite and dynamite caps in stock, even if it should be held that such knowledge should be imputed to defendants, would not be sufficient to sustain plaintiff's contention that each of the defendants, because of such knowledge, had waived the violation by plaintiffs of the condition in the policies with respect to the keeping of explosives. There would be no presumption of law or fact that hardware merchants of Surry County, who carry fire insurance on their stocks of merchandise generally violate a condition of their policies. The presumption would be rather that they procure agreements by the companies in writing added to the policies, by which the condition with respect to explosives is waived. Evidence tending to show that hardware merchants of Surry County generally carry dynamite and dynamite caps in stock was properly excluded upon defendants' objections.

This appeal involves the same question of law as that presented for decision in *Midkiff v. Insurance Co., ante,* 139. In that case there was evidence tending to show a waiver by defendant of the condition in the policy with respect to explosives. The judgment on the verdict was affirmed. In the instant case, there was no evidence tending to show that either of the defendants had waived this condition, in accordance with the provisions of the policies, or otherwise. Therefore the judgment dismissing each action as of nonsuit, must be

Affirmed.

STATE v. ROY RHYNE.

(Filed 24 April, 1929.)

Intoxicating Liquor B a—Evidence of possession of intoxicating liquor in this case held competent.

With evidence tending to show that at night the defendant on trial for violating the prohibition law for possession and transporting of intoxicating liquor, left his automobile on the highway and went into a wood and returned with a half-gallon jar of whiskey under each arm, which he broke and sought to escape arrest, testimony is competent that the officers returned the next morning and found five gallon cans "in the same spot where they went" as a competent circumstance with the other evidence.

CRIMINAL ACTION before *Stack, J.,* at September Term, 1928, of ANSON.

The defendant was indicted for violation of the prohibition law and was convicted of unlawful possession of intoxicating liquors and of transporting the same. He was sentenced to serve a term of six months on the roads and fined $250.00 and costs.

From judgment pronounced the defendant appealed.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

McLendon & Covington for defendant.

PER CURIAM. The evidence tended to show that the defendant and another drove a truck into the woods about seventy-five or one hundred yards from the public road, got out and walked back into the woods. When they returned the defendant Rhyne had a half-gallon jar of whiskey under each arm. The officers were lying in wait at the truck and the defendant broke the jars and escaped. These events took place about nine o'clock at night. The trial judge permitted an officer to testify that early next morning he went back into the woods "in the same spot where they went" and found three five-gallon cans which were empty.

The defendant objected to this testimony and assigns the admission thereof as error.

There was ample evidence to support the conviction, irrespective of the evidence objected to. However, the finding of the empty cans at the identical spot where the defendant went the night before was a competent circumstance.

No error.

MARY B. FORD v. WILLYS-OVERLAND, INC.

(Filed 1 May, 1929.)

1. **Principal and Agent A b—Agreement determines whether relationship is that of agency or independent dealer.**

   The form of a written contract for the local sale of automobiles will not control the question of whether the local representative is a purchaser thereof or an agent therefor, but the correct interpretation of the writing itself as to its effect will fix the status of the local representative in this respect.

2. **Same—Agreement with partnership for representation, taken over after its incorporation by the corporation, controls.**

   Where a partnership has a written agreement for the local sales of automobiles and thereafter the partnership is incorporated and continues to act under the agreement with the implied acquiescence of the company distributing the automobiles to local dealers, the unmodified or original agreement will govern the relationship as to whether the corporation was an independent local dealer purchasing the machines or a sales agent.

3. **Same—Agreement held to create relationship of independent dealer—Automobiles—Warranties.**

   Where a contract creating a local representative for the sale of automobiles, by interpretation as to its effect, creates the relationship of vendor and purchaser, the local representative may not bind the vendor upon a warranty of the machines, and the vendor is not liable for representations or warranties made by the local dealer, and an action against it on such warranty is properly nonsuited.

APPEAL by defendant from *Harding, J.*, at January Term, 1929, of RICHMOND. Reversed.

Action to recover damages for breach of warranty alleged to have been made by the Rockingham Sales Company, as agent of defendant, in the sale of an automobile.

Defendant denied that the Rockingham Sales Company was its agent; it alleged that said company was its local dealer in the town of Rockingham, N. C., and that as such dealer the said company had no authority, express or implied, to warrant said automobile, as agent of defendant.

From judgment on an adverse verdict, defendant appealed to the Supreme Court.

J. C. Sedberry for plaintiff.
Ozmer L. Henry for defendant.

CONNOR, J. On 27 August, 1926, plaintiff purchased a Whippet sedan automobile from the Rockingham Sales Company, paying therefor the sum of $840.00. The Rockingham Sales Company was a corporation, organized under the laws of the State of North Carolina. During the month of August, 1926, the said company was engaged in the business of selling automobiles, as a local dealer, in the town of Rockingham, N. C. It purchased the automobile which it sold to plaintiff from defendant. The defendant is a corporation organized under the laws of the State of Virginia. It is engaged in the business of selling and distributing to its local dealers automobiles manufactured by the Willys-Overland Company, a corporation organized under the laws of the State of Ohio.

The defendant sold the automobile which was purchased by plaintiff to the Rockingham Sales Company, as the successor of the Knight-Overland Company, a partnership, pursuant to and under the terms of an agreement in writing, by which the Knight-Overland Company became the local dealer of defendant, at Rockingham, N. C., in Whippet and Willys-Knight automobiles. The said agreement was signed by the individuals who composed the said partnership, and who were thereafter the incorporators of the Rockingham Sales Company. The corporation was organized to take over the business of the partnership, as a dealer in automobiles. Defendant recognized the corporation as the successor of the partnership, and continued to do business with it as such successor, under the terms of the written agreement. The relationship between the defendant and the corporation, as successor of the partnership, was determined by the said written agreement. This relationship, at least as between the parties, was that of vendor and vendee, and not that of principal and agent. One of the express stipulations of said written agreement was that the Knight-Overland Company, called therein the "Dealer," was in no way the legal representative or agent of the defendant, called therein the "Seller," for any purpose whatsoever, and that the dealer had no right to assume or create any obligations of any kind, expressed or implied, on behalf of the seller, or to bind the seller in any respect whatever.

This stipulation, however, is not conclusive, on the plaintiff, who purchased the automobile from the dealer, for, notwithstanding its provisions, the plaintiff may show, if she can, by evidence, that the dealer was in fact and in law the agent of the defendant, with authority, by reason of such relationship to act for and in behalf of defendant, within the scope of the agency. If under the provisions of the written agreement, the relationship between the parties is that of principal and agent, it is immaterial that they are called therein "Seller" and "Dealer." This principle was applied in *McNeill v. Electric Storage Battery Co.*, 109 S. C., 326, 96 S. E., 134. It was held in that case that notwithstanding a provision in the contract to the contrary, the parties thereto were principal and agent. It is said in the opinion: "It is true the contract provided that the relation of principal and agent should not exist, but when the provisions of the contract make a contract of agency, then it is a contract of agency, and it makes no difference by what names the parties call themselves." In the instant case, however, there are no provisions in the written agreement inconsistent with or contradictory of the express provision that the dealer is not the agent of the seller. Nor was there any evidence tending to show a course of dealing between the defendant and the Rockingham Sales Company, by which the latter was recognized or held out by the defendant as its agent in the sale of automobiles.

In *Huselton v. Motor Car Co.*, 81 Pa. Super. Ct., 526, it was held that "where an authorized distributor of motor cars enters into a contract with a local dealer for a given territory, agreeing to furnish the dealer a certain quantity and variety of cars, the relationship thereby established is not one of agency." The contract between the parties in that case is substantially the same as the contract in the instant case.

The defendant as seller of Whippet and Willys-Knight automobiles made no warranty to its local dealer, the Rockingham Sales Company, or to purchasers of said automobiles from its said local dealer, with respect to said automobiles. It is expressly provided in the agreement under which said automobiles were sold that the only warranty with respect to Whippet and Willys-Knight automobiles is that of the manufacturer, which is set out in said agreement. There was evidence tending to show that under the terms of this warranty, the manufacturer sent a mechanic to Rockingham to remedy the defect in plaintiff's automobile. Plaintiff in her letter addressed to defendant, dated 14 March, 1927, said that in response to her letter dated 8 March, 1927, "your Mr. Nichols arrived and completely overhauled my car. He found and rectified the trouble, and no doubt his report to you completely covers all the details." In this letter plaintiff requested the defendant to pay her $30.00, "actual money which my husband and I have spent for work directly necessary by this fault in the assembling of my car." Under the terms of the warranty made by the manufacturer of plaintiff's automobile, neither said manufacturer nor the defendant were liable to plaintiff for said sum of $30.00, or any other sum. *Ward v. Liddell Co.*, 182 N. C., 223, 108 S. E., 634.

In the absence of any evidence at the trial of this action in the Superior Court, tending to sustain an affirmative answer to the first issue submitted to the jury there was error in the refusal of the court to allow defendant's motion, at the close of all the evidence, for judgment as of nonsuit. C. S., 567. The motion should have been allowed and the action dismissed.

The Rockingham Sales Company did not make or purport to make any warranty of the automobile purchased by the plaintiff in behalf of defendant or upon which defendant should be liable. The warranty, if any, was made by the said company on its own behalf, and it alone is liable for any breach of said warranty. The judgment that plaintiff recover of defendant the damages assessed by the jury for breach of the warranty alleged in the complaint is

Reversed.

W. J. SHUFORD, RECEIVER OF THE "Y. & B. CORPORATION," v. J. A. YARBOROUGH AND EAGLE INDEMNITY CO.

(Filed 1 May, 1929.)

1. **Pleadings D b—Joinder of unnecessary parties not demurrable.**

   A demurrer for defect of parties and causes of action will not be sustained where the defect alleged relates to parties not necessary to the proper determination of the action.

2. **Same—Joinder of defaulting officer and surety on his bond is proper under facts of this case.**

   A suit by the receiver of a corporation against its defaulting officer and the surety or guarantor for his honesty or fidelity is not objectionable as a misjoinder of parties and causes of action, the alleged default of the principal having occurred that created the surety's liability within the terms and conditions of its bond. *Clark v. Bonsal*, 157 N. C., 270, in which the indemnity was against "loss actually paid" cited and distinguished.

APPEAL by defendants from *Stack, J.,* at March Term, 1929, of MECKLENBURG.

Civil action by plaintiff, receiver, to recover of J. A. Yarborough $60,625.84, moneys alleged to have been unlawfully abstracted and misappropriated by him while acting as president and treasurer of the Y. & B. Corporation, and to hold the Eagle Indemnity Company liable for said defalcations to the extent of $10,000 on its written guaranty of the fidelity of said officer.

A demurrer was interposed chiefly upon the grounds (1) of an alleged defect of parties, and (2) of an alleged misjoinder, both of parties and of causes of action.

From a judgment overruling the demurrer, the defendants appeal, assigning errors.

Preston & Ross and E. B. Cline for plaintiff.
Wade H. Williams and Fred B. Helms for defendants.

STACY, C. J. The demurrer was properly overruled on both grounds. C. S., 507 and annotations.

A "defect of parties" applies to necessary parties, and not to unnecessary ones. *Winders v. Hill,* 141 N. C., 694, 54 S. E., 440.

It is not a misjoinder of parties and causes for the receiver of a corporation to sue its president and treasurer for wrongfully abstracting and misappropriating funds of the corporation and at the same time join as party defendant his surety or the guarantor of his honesty and fidelity. *Carswell v. Talley,* 192 N. C., 37, 133 S. E., 181; *Robinson v. Williams,* 189 N. C., 256, 126 S. E., 621; *Chemical Co. v. Floyd,* 158 N. C., 455, 74 S. E., 465; *S. v. Bank,* 193 N. C., 524, 137 S. E., 593.

The case of *Clark v. Bonsal,* 157 N. C., 270, 72 S. E., 954, is not in point, for there the contract between the defendants was one of strict indemnity against "loss actually paid." The allegations of the present complaint are to the effect that the defendant, Eagle Indemnity Company, "guarantees the fidelity of the president and treasurer of the Y. & B. Corporation in the sum of $10,000, . . . and agrees to make good any loss sustained by reason of his dishonesty, theft or wrongful abstraction," etc., and that loss has already been sustained within the terms of the contract of guaranty.

Affirmed.

AMERICAN BLOWER COMPANY, A CORPORATION, ET AL., V. B. MACKENZIE.

(Filed 1 May, 1929.)

1. **Dower B a—Definition of Inchoate Dower.**

Inchoate dower is not an estate in land but is a subsisting, substantial right of the wife in the lands of her husband during his life, possessing some of the incidents of property, and which has a present cash value capable of computation, and becomes a right of dower upon the husband's death if she survive him.

2. **Dower B b—Right of wife to cash value of inchoate dower as against creditors.**

Where the husband's lands are sold by a receiver appointed by the court, and the husband and wife join in the receiver's deed to the purchaser, who assumes prior mortgage indebtedness thereon, and the parties agree that the wife's inchoate dower shall attach to the proceeds of the sale, the sale is not a foreclosure of the prior mortgages and the wife's right of inchoate dower attaches to the proceeds of the sale, and the cash value of the inchoate right is computable and the wife is entitled thereto as against other creditors of the husband.

3. **Dower B b—Computation of present value of inchoate dower.**

The rule by which the present value of the wife's inchoate right of dower in her husband's lands is obtained is to ascertain the present value of an annuity for her life equal to the interest on one-third of the value of his lands to which her contingent right of dower attaches, and then deduct from the present value of the annuity for life the value of the annuity during the joint lives of herself and husband, the difference being the present value of her contingent right.

4. **Same—Mortgage encumbrances not deductible from value of inchoate dower—Mortuary Tables.**

The value of the wife's inchoate dower in the proceeds of sale of her living husband's lands upon which there are unpaid mortgages is calculated upon the value of the entire proceeds of sale of the lands without deduction of the mortgage indebtedness assumed by the purchaser, and as the individual and joint life expectancies according to the mortuary tables are dependent in part upon health and habits, the question of the present value of the inchoate right of dower must be submitted to a jury under proper instruction from the court unless otherwise agreed to by the parties interested.

5. **Dower A b—Lands or interests to which dower attaches.**

Where a wife joins in the mortgage conveyance of her husband to exclude her claim for inchoate dower therein, her relation to the transaction is that of surety, and should she survive him and the land is sold to satisfy the debt she becomes a creditor of the estate in the amount equal to her dower.

6. Mortgages H a—Sale of mortgaged property by receiver of mortgagor is not foreclosure.

Where the receiver of the insolvent husband, under order of court, sells and conveys the husband's lands, and the husband and wife join in his deed under agreement that her right of inchoate dower should attach to the proceeds, and the land sold is subject to prior mortgage liens which the purchaser at the sale assumes, the effect of the transaction is not a foreclosure of the mortgaged property either technically or substantially.

APPEAL by Ethel T. McKenzie, wife of defendant, from *Stack, J.*, at May Term, 1928, of GUILFORD. Error.

Sidney J. Stern for appellant.

King, Sapp & King, Shuping & Hampton and J. S. Duncan for creditors.

Broadhurst & Robinson for receiver.

ADAMS, J. This action was instituted by the American Blower Company to recover the sum of $5,422.10 with interest from 31 August, 1926, alleged to be due for appliances and equipment sold to the defendant. It was alleged in the complaint that the defendant was indebted in large amounts to sundry other creditors; that he was insolvent, and that the administration of his estate demanded the appointment of a receiver. Other creditors were given leave to join in the suit. Upon admission of all the allegations in the complaint Judge Oglesby, finding as a fact that the defendant was insolvent, appointed a receiver of his property. At this time the defendant was the owner in fee of two lots in the city of Greensboro. On the first lot was a deed of trust executed on 31 March, 1920, by the defendant and his wife to Julian Price, as trustee for the Jefferson Standard Life Insurance Company; on the second, a deed of trust executed by the defendant to the Atlantic Bank & Trust Company, as trustee for G. S. Boren and C. H. Andrews, on 18 March, 1925; and on both lots, a deed of trust dated 14 July, 1925, executed by the defendant and his wife to R. D. Douglas, as trustee for the Greensboro Bank & Trust Company. The deed held by Price was executed to secure an indebtedness of $20,000 evidenced by notes signed by the defendant and his wife, to whom the surplus in case of sale was to be paid—the remainder due on these notes and assumed by the purchaser being $17,451.61. The deed held by the Atlantic Bank & Trust Company was made to secure a debt of $71,500 as the purchase price of land, evidenced by notes signed by the defendant, to whom upon sale the surplus was to be paid—the remainder due and assumed by the purchaser being $45,750. The deed held by R. D. Douglas was intended to secure notes signed by the defendant, to whom any surplus was to be paid, the remainder due and assumed by the purchaser being $30,304.61.

By an order of court the receiver was authorized to sell the defendant's assets by public auction or at private sale. He reported that he had received from C. C. Hudson an offer to pay $126,000 for the two lots on these terms: Hudson was to get a deed in fee with full covenants and was to assume payment of the deeds of trust; and all taxes and assessments against the property were to be paid by the receiver or credited on the amount offered. The defendant and his wife consented to join the receiver in conveying the property to Hudson for the purpose of releasing such right of homestead or inchoate right of dower as they were entitled to, with the understanding that the funds derived from the sale of the property should be impressed with such right of homestead or inchoate right of dower. The offer was accepted, and on 18 June, 1927, they and the receiver executed and delivered to Hudson, Incorporated, a deed in fee, in which is recited the purchaser's agreement to pay the amounts secured by the respective deeds of trust.

The receiver advertised for claims and among those presented was that of the defendant's wife, Ethel T. MacKenzie. She contended that as the funds were to be impressed with her inchoate right of dower she was entitled to $25,568.18 on this theory: her expectancy was 31.1 years and that of her husband 14.7 years; one-third of the income from the purchase price of the property was $2,530; the cash annuity of one dollar for 16.4 years (her expectancy beyond that of her husband) according to the annuity tables (C. S., 1791) is $10.106, and the cash value of an annuity of $2,530 for the same period is $25,568.18.

The receiver rejected this claim on the ground that during the life of the husband the wife had no vested interest or estate in his property which would entitle her to participate in the fund either as a preferred or as an unsecured creditor. Upon exceptions filed Judge Stack gave judgment as follows: that two-thirds of the amount available to creditors ($29,521.45) be paid ratably to the creditors whose claims had been allowed and that the remaining one-third be turned over to the clerk to be loaned on good security; that the income therefrom during the joint lives of the defendant and his wife, after payment of all taxes, be distributed from time to time ratably on the allowed claims; that if the claimant die before her husband the principal and undistributed interest be paid on such claim; that if she survive her husband the income be paid to her during her natural life or at her election the present cash value; and that after her death the fund be distributed ratably among the creditors whose claims had been allowed. The claimant excepted and appealed.

In rendering judgment his Honor probably had in mind the principle stated in *Vartie v. Underwood,* 18 Barb. (N. Y.), 561, as it is given in *Gore v. Townsend,* 105 N. C., 228: "The wife's inchoate right in the husband's land follows the surplus moneys raised by a sale in virtue of the power of sale in a mortgage executed by her with her husband, and will be protected against the claims of the husband's creditors by directing one-third of such surplus moneys to be invested, and the interest only to be paid to the creditors during the joint lives of husband and wife." But the present appeal rests upon the wife's demand that the cash value of her inchoate right of dower be determined; it presents for review the questions whether the present pecuniary value of such right may be determined, and if it may whether the value of the land without deducting the debts secured by the deeds of trust shall form the basis of computation.

Inchoate dower or the inchoate right of dower is the interest which the wife has in the lands of her husband during his life and which may become a right of dower upon his death. Black's Law Dictionary. In *Gwathmey v. Pearce,* 74 N. C., 398, it is defined as a vested right to dower; in *S. v. Wincroft,* 76 N. C., 38, as a mere right which may never exist, not an estate in her husband's land; in *Gatewood v. Tomlinson,* 113 N. C., 312, as an inchoate right or estate in land, the enjoyment of which is postponed until the death of the husband; in *Rodman v. Robinson,* 134 N. C., 503, as a right which the wife has in her husband's land, contingent upon her surviving him; and in *Trust Co. v. Benbow,* 135 N. C., 303, as a valuable interest in land. In *Bethell v. McKinney,* 164 N. C., 71, it is said to be an existing encumbrance on land within the meaning of a covenant against encumbrances, and in *Corporation Commission v. Dunn,* 174 N. C., 679, quoting from 14 Cyc., 925, to be neither an estate nor an interest in land. Referring to the nature and incidents of this right, the Court said in *Gore v. Townsend, supra:* "It is true that the inchoate right of dower was never considered an estate of interest in a court of law, which did not even concede the power of the widow to convey her unassigned dower after the right had become consummate by the husband's death, but she might make a contract for the sale that would be enforced in a court of equity. *Potter v. Everett,* 42 N. C., 152; *Boyles v. Commissioners,* 40 Pa. St., 37. It must be remembered, however, that the discussion of the nature of the wife's interest in her husband's land has assumed a new phase since the enactment of the law restoring the common-law right of dower in North Carolina." And further: "2 Scribner Dower, 8, says: 'Although, therefore, an inchoate right of dower cannot be properly denominated an estate in lands, nor, indeed, a vested interest therein, and, notwithstanding the difficulty of defining with accuracy the precise legal qualities of the interest, it may, nevertheless, be fairly deduced from the authorities that it is a substantial right, possessing in contemplation of law, the attributes of property, and to be estimated and valued as such.' It has many of the incidents of property. It has a present value that can be computed."

The inchoate right of dower is not an estate in land; it confers no control of the land or right of possession; but it is a subsisting, substantial right, possessing some of the incidents of property and having a present cash value which, as said by Scribner, is capable of computation. *Gore v. Townsend, supra;* 19 C. J., 493.

The last statement is at variance with the position that there is no scale or standard for ascertaining the present worth of the widow's inchoate right *(Reiff v. Horst,* 55 Md., 42), but it is in accord with the reasoning and conclusion of several courts which declare the law to be that such a standard does exist. These courts say that the present value of the wife's contingent right of dower during the life of the husband can be computed and that the correct rule of computation is to ascertain the present value of an annuity for her life, equal to the interest in the third of the proceeds of the estate to which her contingent right of dower attaches, and then to deduct from the present value of the annuity for her life, the value of a similar annuity depending upon the joint lives of herself and her husband. The difference between these two sums will be the present value of her contingent right of dower. *Jackson v. Edwards,* 7 Paige 386, 408; *Brown v. Brown,* 94 S. C., 492; *Strayer v. Long,* 86 Va., 557, 563; *Gordon v. Tweedy,* 74 Ala., 232, 49 A. R., 813. It is obvious that there is a difference between this rule and that for ascertaining the present worth of dower to which the wife is entitled after the death of her husband. One of its commendable features is the means by which the rights of the parties are presently determinable and by which the title to property is released from encumbrance or doubt.

This is the most feasible rule; but what is the basis upon which the computation shall be made? Is it the full value of the real estate ($126,000), or the full value less the amount due on the purchase price, or the full value less the amount remaining due on the two deeds of trust signed by the wife, or the surplus or net amount remaining after payment of the encumbrance? The receiver and the creditors say the basis last named is the correct one for the reason that the receiver's sale, in which the defendant and his wife took part, was in legal effect a foreclosure of the deeds of trust and that the claimant, if her husband were dead, would be dowable only in the surplus remaining after paying the debts secured by the deeds of trust. Jones on Mortgages (6 ed.), sec. 666; Pingrey on Mortgages, sec. 2013; 2 Scribner on Dower, 607; Annotation to *Commercial B. & T. Co. v. Dudley,* 12 A. L. R., 1358; *Bailey v. Bailey,* 172 N. C., 671. The position implies that the deeds of trust have been foreclosed; but this implication the claimant protests and asserts that no foreclosure has taken place.

Foreclosure of a mortgage or deed of trust may be effected by a decree in equity by which the mortgagor's right to redeem the estate is defeated or by the execution of a power of sale contained in the mortgage or deed of trust without recourse to the courts. Whether in the case before us there was a foreclosure depends upon the legal effect of the transaction between the purchaser and the grantors in the receiver's deed. The purchaser's offer was to "assume" payment of the secured indebtedness; Judge Oglesby's order authorized conveyance of the mortgaged property to the purchaser, subject to the encumbrances; both the receiver's report and the receiver's deed refer to the deeds of trust as having been "assumed" by the purchaser. The record does not show whether these assumed debts have been paid; they may be yet outstanding. Nor does it appear that the trustees or the beneficiaries of the trusts were parties to the agreement between the grantors and the purchaser. For aught that appears in the record neither the trustees nor the beneficiaries have released the defendant and his wife from liability on their notes. The receiver conveyed subject to the encumbrances; the defendant and his wife by signing the receiver's deed conveyed their equity of redemption. C. S., 4100. We do not perceive how in these circumstances the conveyance to the purchaser constitutes a foreclosure of the trusts either technically or substantially. By consenting to join in the conveyance on condition that the funds derived from the sale should be impressed with such right of homestead or inchoate right of dower as they might be entitled to, the defendant and his wife intended merely to substitute their interest in the funds for their interest in the conveyed property. If the conveyance to Hudson had not been made what would have been the wife's interest in her husband's estate? Of course, an inchoate right of dower. To determine the present value of this right under the rule given above it is essential to ascertain the property of which she would have been dowable if at the date of the conveyance she had been the survivor of her husband. She would then have been entitled to an estate for her life in one-third in value of all lands and of all legal rights of redemption and equities of redemption whereof her husband was seized at any time during the coverture, subject to all valid encumbrances made during coverture with her free consent. C. S., 4100. She would have lost her right to dower as against the trustees in the deeds of trust or those claiming under them to the extent necessary to protect the security and no further; but as against other persons her dower rights would have been paramount. 19 C. J., 485, sec. 85(2). This is so for two reasons: (1) the dower or right of dower may not be subjected during the widow's life to the payment of debts due from the estate of her husband (C. S., 4098); (2) if a wife joins her husband in the conveyance of her separate real estate to secure his debt or in the conveyance of his land, in which she has a right of dower, to secure his debt, the relation which she sustains to the transaction is that of surety; and if she survives him and the land is sold to satisfy the debt she becomes a creditor of his estate in an amount equal to the value of her dower. *Purvis v. Carstaphan,* 73 N. C., 575; *Gwathmey v. Pearce, supra; Gore v. Townsend, supra.* In such case upon what basis should the value of her dower be computed?

In *Chemical Co. v. Walston,* 187 N. C., 817, 824, it is said: "Prior to the execution of any mortgage the wife's inchoate right of dower was in the whole land. The fact that she executes the mortgage does not reduce her dower right to the excess over and above the mortgage encumbrance, but her dower in the whole tract is conveyed as security for the payment of the debt. The husband's 'legal rights of redemption and equities of redemption' (C. S., 4100) were in the whole tract, and hence the widow's claim for dower extends to the whole tract." As was observed in that case, in determining the widow's dower, the value of the land, without deducting the mortgage debt, should form the basis of computation. This is true not only as to the land described in the two deeds of trust which the claimant signed, but as to the land described in the deed to the Atlantic Bank & Trust Company as security for the purchase price. In *Overton v. Hinton,* 123 N. C., 1, it was held that a widow was entitled to dower in land purchased by her deceased husband who had executed notes for the purchase and had secured them by a deed of trust on the land. If the claimant were entitled to dower, the value of the land, without deducting the secured debts, would be the basis of computation; and this must be considered in computing the present value of her inchoate right of dower in the property of which she would be dowable as the survivor of her husband. The claimant is therefore entitled to the present cash value of her inchoate right of dower in the value of the land ($126,000) without deduction of the secured debts, to be determined according to the rule heretofore stated; and as the individual and joint life expectancies are dependent in part upon age, health, and habits (*Gore v. Townsend, supra*), the question of the present value of the inchoate right of dower must be submitted to a jury upon correct instructions, unless an agreement as to the amount can be reached by the interested parties.

Error.

A. E. TATE, W. C. IDOL, W. F. CLAYTON, J. L. SPRUILL, J. W. SLATE, GEORGE F. WILSON, E. C. CRIDDLEBAUGH, AND A. T. MOFFITT, TRUSTEES OF FIRST BAPTIST CHURCH OF HIGH POINT, v. R. T. AMOS AND J. E. AMOS.

(Filed 1 May, 1929.)

1. Wills E a—General rules for construction of wills.

A will and codicils thereto will be considered together as one instrument and construed in their entirety to effectuate the intent of the testator as gathered from the language used.

2. Same—Presumption against intestacy.

A will will be construed so as to avoid intestacy when this can be reasonably done, and the word "or" will not be construed as "and" when the latter word would defeat the testator's intent under a proper interpretation of the instrument.

3. Wills E b—Estates created by will.

In a devise of a certain city lot to a designated beneficiary "or to her children," the devisee having a child, to whom a devise is made under a different item of the will, the word "or" will not be construed to mean "and" when the latter interpretation would defeat the intent of the testator or have the legal effect of rendering the devise void, but will be construed to vest the fee-simple title in the mother should she survive the testator, otherwise to her child or children.

APPEAL by defendants from *Moore, J.,* at March Term, 1929, of GUILFORD. Affirmed.

The agreed statement of facts is as follows:

"1. That for sometime prior to her death, S. M. Farabee was the owner in fee simple of a tract or parcel of land, in High Point, North Carolina, more particularly described as follows:

"'Fronting 100 feet on west side of North Main Street in the city of High Point, lying between the lines of N. W. Beeson and W. P. Pickett; thence westwardly 200 feet deep and 100 feet in the rear, being 100 feet by 200 feet and containing 20,000 square feet, more or less.'

"2. That said S. M. Farabee died on or about 20 May, 1908, leaving a last will and testament, which is set out in Exhibit 'A' and made a part of this paragraph.

"3. The said will was duly witnessed and properly executed to devise land, and is recorded in Will Book H, page 316, office of the clerk of the Superior Court of Guilford County.

"4. That at the time of the execution and probate of the will, the said Grace Darling Winend Hendrick had one living child and he is still living and has obtained his majority within the last three years; that the said child is Charley Thomas Hendrick, Jr., to whom the brick storehouse and lot on North Main Street, No. 301½ known as the China Laundry, was devised; that the said Charley Thomas Hendrick, Jr., has not joined in any conveyance of the land described in fact 1 of this agreement.

"5. That the lot on North Main Street, known as No. 527, occupied by said Grace Darling Winend Hendrick at the time the will aforesaid was executed and devised to said Grace Darling Winend Hendrick by last will and testament of the said S. M. Farabee aforesaid, is the same land described in fact 1 of this agreement.

"6. That on 14 May, 1912, said Grace Darling Winend Hendrick, unmarried, conveyed by deed, fee simple in form, the property described in fact 1, to Roy Skiff by deed recorded in Book 238, page 590, in the office of the register of deeds of Guilford County, North Carolina, and that the aforesaid land, by various *mesne* conveyances, fee simple in form, thereafter has come into the possession of plaintiffs in this action and is now held by them.

"7. That A. E. Tate, and others, trustees of the First Baptist Church of High Point, North Carolina, contracted to sell said lands and other property to the defendants at and for the sum of $50,025.00, and defendants agreed to purchase said land at said sum.

"8. That defendants, after making aforesaid agreements, declined to accept deed to said land and pay the purchase price thereof because, as they alleged, the title to the tract of land hereinbefore described is defective, for that said Grace Darling Winend Hendrick was not the owner in fee simple of the said property.

"9. That Grace Darling Winend Hendrick had been reared by the testator, S. M. Farabee, and at the time of said Farabee's death, was living at her home and while not an adopted child, the relations between said Farabee and said Hendrick were very close and intimate."

Mrs. S. M. Farabee, after providing for the payment of her funeral expenses and debts, the will reads in part as follows: "Then I give to my beloved sister, Martha Ann English, or to her heirs, the lot and house on North Elm Street, No. 16, that was my mother's property. To my two nephews, Alva C. and Carson N. English, I give this lot and house No. 304 North M. St., and the storehouse No. 302, to be equally divided between them, two brothers, or their heirs. And to Charley Thomas Hendrick, Jr., I give the brick storehouse and lot on North Main Street, No. 300½, known as the China Laundry, for his mother to keep for him. *To Grace Darling Winend Hendrick, I give the lot and house on North Main Street, No. 527, that she now occupies, or to her children, and all my wearing clothes and bed clothes if she wishes them.* To Daisy L. Hiatt Wall I leave one single feather bed, two pillows, two quilts, and one blanket, and two sheets."

The judgment of the court below, was as follows: "This cause coming on to be heard before his Honor, Walter E. Moore, upon facts agreed; and the court being of opinion that the plaintiffs are seized in fee of the lands described in paragraph 2 of the complaint and can convey a fee-simple title thereto to the defendants: Now, therefore, it is ordered and adjudged that the plaintiffs recover of the defendants the sum of $50,025.00 upon their delivery to the defendants of a deed for said land, fee simple in form."

G. H. Jones, Holye & Harrison for plaintiffs.
Roberson, Haworth & Reese for defendants.

CLARKSON, J. The question of law involved in this case is whether or not Grace Darling Winend Hendrick acquired a fee-simple title to the lot in controversy, under the will of S. M. Farabee, in words as follows: *"To Grace Darling Winend Hendrick I give the lot and house on North Main Street, No. 527, that she now occupies, or to her children, and all my wearing clothes and bed clothes if she wishes them."* We think so.

In *Ellington v. Trust Co.,* 196 N. C., p. 755, the law is thus stated: "The guiding star in the interpretation of wills, to which all rules must bend, unless contrary to some rule of law or public policy, is the intent of the testator, and this is to be ascertained from the four corners of the will, considering for the purpose the will and any codicil or codicils as constituting but one instrument. 28 R. C. L., 211, *et seq.*" This principle is well settled in this jurisdiction.

Appellants, defendants, contend (first) that in the construction of the will "or" means "and" and the lot in controversy would vest in Grace Darling Winend Hendrick and Charley Thomas Hendrick, Jr., as tenants in common.

This Court has uniformly held that a devise to "A." and her children, "A." having children, vests the estate to them as tenants in common. *Hunt v. Satterwhite,* 85 N. C., 73; *Silliman v. Whitaker,* 119 N. C., 89; *Lewis v. Stancil,* 154 N. C., 326; *Cullens v. Cullens,* 161 N. C., 344; *Snowden v. Snowden,* 187 N. C., 539; *Cunningham v. Worthington,* 196 N. C., 778.

The substitution of word "or" used as "and" is fully discussed in *Wood v. Wood,* 132 S. C., 120, 128 S. E., 837. See *Neal v. Nelson,* 117 N. C., 393; *Silliman v. Whitaker, supra; Christopher v. Wilson,* 188 N. C., 757; *Robertson v. Robertson,* 190 N. C., 558. In *Harrison v. Bowe,* 56 N. C., at p. 481, this observation is made: "But, say the counsel, the word 'or' must be construed 'and.' Such a change of words is admissible, certainly, when the intent of the testator will be defeated without it; but it is never admissible unless it is necessary to carry out the manifest design of the will."

Appellants contend (second) that Grace Darling Winend Hendrick and Charley Thomas Hendrick, Jr., are both living and the devise is void for uncertainty. In *Gordon v. Ehringhaus,* 190 N. C., at p. 150, it is said: "When a person, who is capable of doing so, undertakes to make a will, the law presumes that he did not intend to die intestate as to any part of his property." *Faison v. Middleton,* 171 N. C., 170; *McCullen v. Daughtry,* 190 N. C., 215.

We do not think that either of the contentions of appellants, defendants, can be sustained.

The testatrix gave Charley Thomas Hendrick, Jr., a brick storehouse. He was the son of Grace Darling Winend Hendrick. After providing for the son, she devises the lot in controversy to Mrs. Hendrick *or to her children.* We think the principle applicable here is well stated in 1 Jarman on Wills, p. 612, as follows: "The strong tendency of the modern cases certainly is to consider the word 'or' as introducing a substituted gift in the event of the first legatee dying in the testator's lifetime; in other words, as inserted, in prospect of, and with a view to guard against, the failure of the gift by lapse."

A similar case to the present which sustains plaintiffs' contention is *Bender v. Bender,* 226 Pa. St. 607, 75 Atl., 859, 134 A. S. R., 1088.

We think the intention of Mrs. S. M. Farabee, the testatrix, gathered from the entire will, was to devise to Grace Darling Winend Hendrick a fee-simple title to the lot in controversy if she survived the testatrix. If Grace Darling Winend Hendrick died before the testatrix, then the lot in controversy would vest in her child or children in fee simple. She survived the testatrix. This being our interpretation; plaintiffs, who claim under Mrs. Hendrick, acquired a fee-simple title to the lot in controversy. The judgment of the court below is

Affirmed.

C. I. T. CORPORATION v. T. B. DRAKE AND C. A. BURGESS.

(Filed 1 May, 1929.)

Pleadings D b—Where only one defendant is served with summons and the action is against him solely, demurrer for misjoinder properly overruled.

Where an action is instituted against two defendants and only one of them is served with summons and the action is solely against the one served and this appears from the face of the complaint, a demurrer for misjoinder of parties and causes of action is properly overruled.

APPEAL by C. A. Burgess from a judgment of *Harding, J.,* overruling a demurrer to the complaint. From MECKLENBURG. Affirmed.

Lewis & Lewis for appellant.
Pharr & Currie for appellee.

PER CURIAM. This is an action to recover possession of a motor car. The plaintiff alleges that on 9 June, 1928, the Asheville Overland-Knight, Incorporated, sold and delivered a Whippet coupe to T. B. Drake upon a conditional sales contract which was duly recorded in Buncombe County; that on 29 June, 1928, the plaintiff for value bought the note which Drake had executed to secure a part of the purchase price, before its maturity and without notice of any equities against the collection of the note; that after Drake's conviction for a breach of the prohibition laws the car was sold by the sheriff of Iredell County to the defendant Burgess. It is alleged further that the sale was illegal and that the only interest Burgess acquired, if any, was the interest of Drake. Drake has never been served with summons and is not a party to the action. The defendant demurred to the complaint on the ground of an improper joinder of parties and causes of action. The demurrer was overruled and Burgess excepted and appealed.

There is really only one defendant; and since the demurrer admits the allegations in the complaint it is obvious that there is no error in the judgment.

Affirmed.

J. G. RUTLEDGE, JR. v. JOHN W. FITZGERALD.

(Filed 1 May, 1929.)

Appeal and Error J a—Findings of fact presumed correct on appeal.

Where a judgment of nonsuit has been granted, and thereafter the trial judge has restored the cause to the docket upon the ground of excusable neglect and a meritorious defense, the appellant must aptly request the trial court to find the facts upon which the judgment is based, and when this has not been done, and they do not appear of record, it will be presumed that they support the judgment rendered and it will be affirmed on appeal.

APPEAL by defendant from *Oglesby, J.,* at September Term, 1928, of MECKLENBURG. Affirmed.

The following judgment was rendered in the court below: "This cause coming on before his Honor, John M. Oglesby, presiding at the September Term, 1928, Superior Court of Mecklenburg County, on a motion to set aside the judgment obtained on 19 June, 1928, by John W. Fitzgerald, against J. G. Rutledge, Jr., and W. R. Rutledge, and the same being heard: It is hereby ordered, decreed and adjudged, that the said judgment be, and the same is hereby set aside in the discretion of the court on the ground of excusable neglect and surprise, and also for meritorious cause shown to the court, and that the judgment of nonsuit rendered therein also be set aside on account of excusable neglect and surprise, and that the said judgment herein is ordered to be canceled and stricken from the docket, that the said original cause be restored to the trial docket for trial."

The defendant excepted and assigned error to the judgment rendered and appealed to the Supreme Court.

John G. Carpenter for plaintiff.
Jimison & Abernathy for defendant.

PER CURIAM. The defendant did not request the court below to find the facts upon which the rulings of the court below were based. In the absence of such finding, it is presumed that the court below, upon proper evidence, found facts sufficient to support the judgment. The whole matter is fully discussed and decisions cited in *Holcomb v. Holcomb,* 192 N. C., 504; *Helderman v. Mills Co.,* 192 N. C., 626. See *Lumber Co. v. Anderson,* 196 N. C., 474; *Realty Corp. v. Fisher,* 196 N. C., 503; *Coach Co. v. Griffin,* 196 N. C., 559. The judgment of the court below is

Affirmed.

MINNIE D. GANT v. MASON W. GANT.

(Filed 8 May, 1929.)

Negligence A d—In this case held: injury from act could not be foreseen and nonsuit was proper.

Evidence tending to show that the defendant while endeavoring to get his family automobile from the garage on ground covered with ice and snow, had planks placed under the wheels of the machine which were thrown, by the spinning of the wheels, against the plaintiff, his wife, as she stood watching him about fifteen feet from the rear of the car, causing her serious injury: *Held,* injury from the act could not have been foreseen by the defendant as an ordinarily prudent man, but would have required omniscience, and the defendant is not liable in damages, and a judgment as of nonsuit should have been granted on his motion.

CLARKSON, J., dissenting.

CIVIL ACTION, before *Clement, J.*, at February Term, 1929, of GUILFORD.

Plaintiff and defendant are husband and wife, and were at the time of the injury complained of and are now living together in the city of Greensboro.

The evidence tended to show that the defendant owned a Chrysler automobile for the use of himself and family, and that said automobile was placed in a garage at night at the home of plaintiff and defendant. On the morning of 10 January, 1927, a heavy snow was upon the ground. Plaintiff went to the garage and attempted to get the automobile out to the street in order to take the children to school. She was unable to do so, and thereupon the defendant got into the car and attempted to get it out to the street.

Plaintiff's narrative of the occurrence is as follows: "The snow was deep. He tried to back it out and couldn't back it, and he kept running the motor until the car just kept starting and slipping until it turned around, and then he tried to pull it out and the wheels kept sliding. I was out in the yard seeing how it was going to be done. Our cook was out there and she placed a little plank under one wheel. That seemed to help some. Then he told her to get some long planks and put under the wheels, and when she did the car ran over those two long pieces. . . . And when the wheels ran over those planks, instead of going right on off, they spun to the left and the left rear wheel threw the plank back and struck me on the right leg. . . . The plank that struck my right leg was at least four feet long and about seven or eight inches in width and possibly an inch or three-quarters of an inch thick. . . . The car was on the driveway at the time the boards were placed under it. I was standing, I suppose, from the car, ten or fifteen feet. . . . The motor of the automobile was running, and when it ran off the plank it began spinning, and when it struck the snow it consequently threw the plank. The motor of the car was running, it seemed, with all force from the sound of it. I was standing to the left rear of the car."

The plaintiff sustained painful and permanent injury.

The defendant offered no evidence, and the foregoing evidence of the plaintiff is substantially all of the evidence in the case except the testimony of physicians as to the extent of the injury sustained.

Issues of negligence, contributory negligence, and damages were submitted to the jury and answered in favor of plaintiff. The verdict awarded damages in the sum of $2,030.00 The defendant duly lodged motions of nonsuit, and also requested the court to give certain instructions to the jury.

From judgment upon the verdict the defendant appealed.

Shuping & Hampton for plaintiff.
Brooks, Parker, Smith & Wharton for defendant.

BROGDEN, J. The facts are brief and simple. The ground was covered with a heavy snow, and therefore soft and slick. The defendant was not endeavoring to operate the automobile under dangerous conditions, but merely to get his own automobile out of a garage on his own premises. It was suggested upon the oral argument that the defendant should have placed chains upon the automobile before attempting to get it out of the garage, or to have given notice to his wife, the plaintiff, that the wheels were likely to spin. It was also suggested that the defendant was racing the motor. It does not appear that racing the motor caused the wheels to spin. Ostensibly the spinning resulted from contact with a soft, slick surface. These suggestions all lie in the field of speculation. Under the circumstances disclosed by the record the liability of defendant depended upon whether, by the exercise of ordinary care and prudence, he could have reasonably foreseen that some injury would result from attempting to get the automobile out of the garage. The principle of law is thus expressed in *Fore v. Geary,* 191 N. C., 90, 131 S. E., 387: "No man, by the exercise of reasonable care, however high and rigid the standard of such care, upon the facts in any particular case, can foresee or forestall the inevitable accidents, and contingencies which happen and occur daily, some bringing sorrow and loss, and some bringing joy and profit, all however contributing, in part, to make up the sum total of human life. The law holds men liable only for the consequences of their acts, which they can and should foresee and by reasonable care and prudence, provide for."

The plaintiff testified that the first plank used by the defendant "seemed to help some." Thereupon the defendant directed a servant to place two longer planks between the front and rear wheels. The automobile moved over these planks and as it rolled off upon the slick surface the wheel suddenly began to spin, thus kicking one of the planks backward and inflicting the unfortunate injury upon the plaintiff.

In our opinion the evidence does not disclose any negligence upon the part of the defendant. Under the circumstances of the case to require the defendant to foresee that the plank would be kicked backward and injure his wife would practically stretch foresight into omniscience. The law does not require omniscience. The motion for nonsuit should have been allowed.

Error.

CLARKSON, J., dissenting: The following rule in *Hall v. Rinehart,* 192 N. C., at p. 708, has often been approved by this Court: "In *Hud-*

son v. R. R., 176 N. C., 492, *Allen, J.*, says: 'In support of the first two propositions the defendant relies on the definition of proximate cause, in *Ramsbottom v. R. R.*, 138 N. C., 41, approved in *Bowers v. R. R.*, 144 N. C., 686, and in *Chancey v. R. R.*, 174 N. C., 351, as "A cause that produces the result in continuous sequence, and without which it would not have occurred, and one from which any man of ordinary prudence could have foreseen that such a result was probable under all the facts as they existed," to which we adhere, with the modification contained in *Drum v. Miller*, 135 N. C., 204, and many other cases, that it is not required that the particular injury should be foreseen, and is sufficient if it could be reasonably anticipated that injury or harm might follow the wrongful act.' "

Defendant undertook to get his automobile out of the garage. He got it out in the snow. Plaintiff was in the yard, seeing how it was going to be done. Snow was on the ground 10 or 12 inches deep and the wheels would not catch, but kept spinning. It is a matter of common knowledge that frequently in snow or soft dirt the wheels of an automobile without chains do not move forward but spin, and when the power is put on the wheels when spinning throw dirt and debris in the air and in the rear of the car. This was known to defendant, or in the use of due or ordinary care ought to have been known. Defendant, to try to get the rear wheels to catch on something and stop the spinning, put two boards in front of the two rear wheels. Frequently chains and brush are used. After putting the boards or plank on the slick ground for the wheels to catch on, defendant put on "all power," the rear wheels caught on the planks, one about 4 feet long, 8 inches wide and 3/4-inch thick, was thrown backward on plaintiff. When the rear wheel ran over the plank, the plaintiff was some 10 or 15 feet distant, standing to the left side of the car, the plank struck her on the right leg and breaking it about 8 or 9 inches up. Anybody who has been in such a plight and had experience in running an automobile could reasonably anticipate that wrong and harm might follow if any one was in the rear or near the rear from such a situation and when the driver of the automobile put on "all power," as the evidence disclosed in the present case. When the "all power" was put on by the driver of the car he gave no warning to the plaintiff standing at the left side of the car in the rear.

The questions of negligence and contributory negligence were questions of due care or the care that a prudent man would exercise under all the circumstances, and this is for the jury to determine. The judge below left it to the jury, they decided that the defendant was negligent and the plaintiff was not guilty of contributory negligence. No doubt the jury had experience in such matters and I think it was for them to decide and not the court.

Negligence has been defined in numerous ways: The omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. It must be determined in all cases by reference to the situation and knowledge of the parties and all the attendant circumstances. It is conceded by all the authorities that the standard by which to determine whether a person has been guilty of negligence is the conduct of the prudent or careful or diligent man.

J. D. CORNELL MILLINERY CO. v. LITTLE-LONG CO., ET AL.

(Filed 8 May, 1929.)

Landlord and Tenant D b—Subleasing for shorter term than original lease does not breach condition not to sell or assign.

A condition in the lease of a store that the lessee should not sell or assign the lease without the consent of the lessor is not violated by the lessee's subletting for a shorter period than the unexpired term specified in the original lease without the lessor's consent, the words "sell or assign" not excluding a sublease, the status between the lessor and the original lessee remaining unchanged by the sublease made by the latter.

APPEAL by plaintiff from *Townsend, Special Judge,* at November Special Term, 1928, of MECKLENBURG.

Civil action to recover damages (1) for an alleged unlawful conspiracy among the defendants to destroy plaintiff's business; and (2) for an alleged wrongful eviction from premises leased by the plaintiff.

The evidence tends to show that in April, 1924, the Little-Long Company leased to Cornell Millinery Company (Ohio corporation) a space 50 by 25 feet across the rear of the second story of its store building, located in the city of Charlotte, for a period of five years, beginning 1 August, 1924, and ending 31 July, 1929. The lease, among other things, contained the following covenant: "Also lessee is not to sell or assign this lease or any part thereof without the consent of the lessor."

On 7 April, 1926, Cornell Millinery Company sublet the premises to the plaintiff, J. D. Cornell Millinery Company (New York corporation), for a term ending 30 June, 1929, that is to say, for a term shorter by one month than the original lease. S. Lipinsky Sons & Company succeeded to the rights of the Little-Long Company, and it is contended that neither the Little-Long Company nor S. Lipinsky Sons & Company ever assented to the subleasing or assignment of the premises.

On this phase of the case, the court instructed the jury as follows: "The instrument, gentlemen, offered in evidence as the sublease between the Cornell Millinery Company and the J. D. Cornell Millinery Company would constitute an assignment of a part of the lease or would come within the meaning of the provisions which I have read to you and unless it was either expressly or impliedly assented to and acquiesced in by the Little-Long Company and S. Lipinsky Sons Company or some one authorized to act in their behalf, such a sublease would not be effective to transfer the premises or any interest therein; and the burden is on the plaintiff to satisfy you by the greater weight of the evidence, first, as to the fact of the assignment, and second, as to the fact of the assent of the Little-Long Company, either expressed or implied. If the plaintiff has failed to so satisfy you, it would be your duty to answer the issue 'No.'" Exception by plaintiff.

It was in evidence that Cornell Millinery Company, the Ohio corporation, discontinued its corporate existence some time in March or April, 1926, prior to the incorporation of J. D. Cornell Millinery Company, the New York corporation, on 25 May, 1926. From this evidence, it was contended that no valid assignment or under-lease was or could have been made to the plaintiff by the original lessee.

On the alleged cause of action for conspiracy, judgment as in case of nonsuit was entered at the close of the evidence; and on the alleged cause of action for wrongful eviction on the part of Little-Long Company and S. Lipinsky Sons & Company, the jury returned a verdict in favor of the defendants.

Plaintiff appeals, assigning errors.

W. T. Shore, Chase Brenizer, John Paul Trotter and Biggs & Broughton for plaintiff.

Merrimon, Adams & Adams and Thomas C. Guthrie for defendants other than W. T. Grant Co.

John Newitt for defendant, W. T. Grant Co.

STACY, C. J., after stating the case: Is a covenant in a 5-year lease "not to sell or assign this lease or any part thereof without consent of lessor" violated by a subletting of the premises, without the consent of the lessor, for a period shorter by one month than the unexpired portion of the original term? We think not. 16 R. C. L., 832.

A covenant in a lease against sale or assignment is *stricti juris,* and it is the general holding that a subletting of the demised premises by the lessee is not a breach of such restriction, because the relation of landlord and tenant between the original lessor and lessee still exists and remains unchanged. *Hargrave v. King,* 40 N. C., 430; *Copeland v. Parker,* 4 Mich., 660; note, 14 L. R. A. (N. S.), 1200; 35 C. J., 982.

"The distinction between an assignment and a lease depends solely upon the quantity of interest which passes, and not upon the extent of the premises transferred. When, therefore, the lessee of a house for seven years demises *part* of the house to another for the *whole* of his term, this is not an under-lease, but an assignment *pro tanto.*"—*Daniel, J.*, in *Lunsford v. Alexander,* 20 N. C., 166.

An assignment creates no new estate, while a sublease does. *Collins v. Hasbrouck,* 56 N. Y., 157, 15 Am. Rep., 407. If a lessee convey or transfer his entire interest in the demised premises, without retaining any reversionary interest therein, a sale or assignment takes place; but if he reserve to himself a reversion of some portion of the term, a sublease and not a sale or assignment is made. *Murdock v. Fishel,* 121 N. Y. Sup., 626; *Banking Co. v. Tobin,* 104 Minn., 333, 116 N. W., 838. "An assignment of a lease passes the whole estate of the lessee; a lease, a less estate than the lessor had." *Waters v. Roberts,* 89 N. C., 145. The reservation by the lessee, therefore, of some portion of the term would seem to be the chief distinction between a sublease and a sale or assignment. *Collins v. Hasbrouck, supra.*

The difference is well illustrated by the decision in *Jackson v. Harrison,* 17 Johns, 66, where it was held that a covenant prohibiting the sale or assignment of a leasehold estate was not violated by an act of the lessee which fell short of divesting his whole legal estate. As stated in the head-note: "Where a lease for the term of seven years, contains a condition that the lessee should not 'assign over, or otherwise part with, the indenture, or the premises thereby leased, or any part thereof, to any person,' etc., and a clause of reëntry, and of forfeiture, for a breach of the condition, no forfeiture is incurred by an underletting for two years, or a period short of the whole term; as the words of the condition are to be construed to mean an assignment of the premises, or a part of them, for the whole term."

Again in *Jackson v. Silvernail,* 15 Johns., 278, it was held (as stated in the head note): "Where a lessee for lives covenanted not 'to sell, dispose of, or assign his estate in the demised premises,' without the permission of the lessor, etc., and the lease contained a clause of forfeiture for the nonperformance of covenants, it was held, that a lease of part of the premises by the lessee for 20 years, was not such a breach of the covenant as would work a forfeiture; and that nothing short of an assignment of his whole estate by the lessee would produce a forfeiture of the lease."

In the leading English case of *Crusoe v. Bugby,* 3 Wilson, 234, 2 Bl. Rep., 766, a tenant for twenty-one years covenanted "not to assign, transfer or set-over, or otherwise do or put away the premises or any part thereof" without permission of the landlord. Afterwards the lessee sublet the premises for fourteen years. It was held that there was no breach of the covenant, on the ground that the demise for fourteen years was an underlease, and not an assignment. And it was observed that the landlord, if he so desired, might have provided against a change of possession, as well as against an assignment, but that he had not done so in language admitting of no other meaning, and that "assign, transfer and set-over," were mere words of assignment, and "otherwise do or put away," as there used, meant any other mode of getting rid of the whole interest and would not be held to prohibit the making of an under-lease.

Applying these principles to the instant case, we think the trial court erred in its peremptory instruction to the jury that a sublease of the premises for less than the full term constituted an assignment of a part of the lease. The words "sell or assign" do not include an underlease, and "any part thereof," as used in the restriction, would seem to refer only to a sale or assignment of some part of the lease. This entitles the plaintiff to a new trial as against the Little-Long Company and S. Lipinsky Sons & Company, but as against the other defendants, the judgment of nonsuit would seem to be correct.

It is not conceded by the defendants that the plaintiff ever had a valid subsisting lease for the premises in question, even though the covenant in the original lease may not restrain the lessee from renting to an under-tenant. The plaintiff, on the other hand, contends that, even if there had been a breach of the covenant, or an invalid lease executed by the lessee, the defendants have duly recognized the sublease and are now estopped to deny its validity. But these are matters to be tried out on another hearing.

New trial.

CARL OATES v. L. L. HERRIN.

(Filed 8 May, 1929.)

1. **Trial E c—Charge should explain all principles of law arising from evidence.**

   Where the issues of negligence, contributory negligence, assumption of risks, and damages are submitted to the jury, it is required that a trial court charge the jury as to the effect of a finding of negligence and contributory negligence on the issues of damages, and his failure to do so is reversible error. The correct form of these issues is given.

2. **Trial E e—Requests for instruction not necessary where error in charge is upon substantial feature of case.**

   Where there is error in the charge upon a substantial feature of the case the appellant is entitled to a new trial upon error assigned without having made a special prayer for instructions in regard thereto.

3. Trial F a—Court has power to give additional instructions and have jury again retire.

The trial court has the power, if he is under the impression created by inconsistent answers to separate issues, that the jury had not understood his charge, to give additional instructions and have the jury again retire for further consideration.

APPEAL by defendant from *Stack, J.,* at March Term, 1929, of MECKLENBURG.

Action for personal injury alleged to have been caused by the negligence of the defendant, a contractor, in failing to furnish the plaintiff, his employee, suitable timbers for the construction of a scaffold, from which the plaintiff fell to the ground. The record discloses these facts:

"The jury, after having deliberated for some time, came in and announced that they had reached a verdict, and returned the following verdict:

1. Was the defendant guilty of negligence as alleged in the complaint? Answer: Yes.

2. Was the plaintiff guilty of contributory negligence as alleged in the answer? Answer: No.

3. Did the plaintiff assume the risk of his injury as alleged in the answer? Answer: No.

4. What damages, if any, is the plaintiff entitled to recover of the defendant? Answer: Lost time and expenses.

The court refused to accept the verdict and sent the jury back for further deliberation. To this ruling of the court, which was made in the absence of counsel for both parties, the defendant excepts, which is defendant's exception No. 10. Thereupon the court further charged the jury as follows, counsel for neither party being present in court: 'I told you if you answered the first issue Yes and the second issue No, and the third issue No, then you would go to the fourth issue, and if you should reach that issue, that you must specify in dollars and say how much. You will have to retire and reconsider, then bring in your verdict.' To the foregoing portion of his Honor's charge the defendant excepts, which is defendant's exception No. 11. The jury went out, and after further deliberation returned a second verdict as follows:

1. Was the defendant guilty of negligence as alleged in the complaint? Answer: Yes.

2. Was the plaintiff guilty of contributory negligence as alleged in the answer? Answer: No.

3. Did the plaintiff assume the risk of his injury as alleged in the answer? Answer: No.

4. What damages, if any, is the plaintiff entitled to recover of the defendant? Answer: $450.00.

Upon the last verdict the court signed the judgment for the plaintiff, which appears in the record, and thereafter, within due and proper time, the defendant duly excepted to said judgment and entered its appeal on the judgment docket, and gave the notice of appeal which appears in the record. The exception to the judgment above mentioned is defendant's exception No. 12."

T. L. Kirkpatrick and B. G. Watkins for plaintiff.
John M. Robinson and Hunter M. Jones for defendant.

ADAMS, J. In *Sasser v. Lumber Co.,* 165 N. C., 242, the jury in response to the first three issues found that the plaintiff had been injured by the negligence of the defendant; that the plaintiff by his own negligence had contributed to his injury, and that he had not assumed the risk of being injured; and in response to the fourth issue the jury assessed the plaintiff's damages at fifteen hundred dollars. The plaintiff entered a motion to set aside the verdict on the ground that the answers to the several issues were inconsistent and contradictory. The motion was denied, and in affirming a judgment for the defendant this Court said: "It is settled by the decisions of this Court that, in an action of this character, where the jury find that the plaintiff was injured by the negligence of the defendant, and further find that the plaintiff by his own negligence contributed to his injury, and then assess damages, the plaintiff is not entitled to recover, and the defendant is entitled to judgment upon the issues." This statement of the law was approved in *Holton v. Moore,* 165 N. C., 549, decided a few weeks after the opinion in *Sasser's case* had been written.

In the cases just cited the verdicts were accepted by the court and entered of record; but in the case before us the judge, under an impression (created by inconsistent answers to separate issues) that the jury had not understood his charge, gave additional instructions and directed the jury to retire for further consideration. His right to pursue this course is established. *S. v. Whitaker,* 89 N. C., 473; *Ayscue v. Barnes,* 190 N. C., 859.

But there is a fatal error in the charge. These instructions were given: "If you answer the first issue No and the second Yes, you will not go any further, but if you answer the second No, then you will consider the third; if you answer the third No, you will go to the fourth. If you answer the first issue Yes, second No, third No, then you will proceed to the fourth issue and say what you find the damages to be. I want to make this plain to you: If you answer the first No, or if you answer it Yes, and second No, and third Yes, you don't go any further, because if he was injured by his own negligence he could not recover, or if he was injured by any danger or risk incident to his employment he cannot recover." To the latter instruction the defendant excepted.

When upon tendering the first verdict, the jury were requested to retire, this instruction was given: "I told you if you answered the first issue Yes and the second issue No, and the third issue No, then you would go to the fourth issue, and if you should reach that issue you must specify in dollars and say how much." We find no instruction as to the effect on the fourth issue of an affirmative answer to each of the first two issues. It was the duty of the judge to give this instruction, without a special prayer, because it was a substantive and not a subordinate feature of the trial, and the exceptions present the question of a failure to enlighten the jury on this aspect of the evidence. *S. v. O'Neal,* 187 N. C., 22; *S. v. Merrick,* 171 N. C., 795. For this reason there must be a new trial. Other exceptions raise serious questions which it is unnecessary to consider.

We take occasion to express our disapproval of the form in which the first two issues were submitted to the jury. They should have been framed so as to enable the jury specifically to find whether the plaintiff had been injured by the negligence of the defendant as alleged in the complaint, and whether the plaintiff by his own negligence had contributed to his injury as alleged in the answer.

New trial.

ANDREWS MUSIC STORE, INC., v. C. H. BOONE AND C. S. THOMPSON.

(Filed 8 May, 1929.)

1. **Parties B a—Joinder of purchaser under conditional sales contract and his vendee not misjoinder.**

   In an action against the vendee under a conditional sales contract the joinder of one claiming title as purchaser for value from the vendee is not objectionable, the subject of the action being the same, and the claimant in possession being a necessary party to the action. C. S., 456, 507.

2. **Sales I b—Unregistered conditional sales contract is valid as to all but creditors and purchasers for value.**

   An unregistered conditional sales contract is valid as against all persons except creditors and purchasers for value, and upon conflicting evidence as to whether one defendant was a purchaser for value from the vendee under the conditional sales contract, the issue is properly submitted to the jury, and a motion as of nonsuit is properly denied. C. S., 3311.

APPEAL by defendant, C. H. Boone, from *Stack, J.,* at February Term, 1929, of MECKLENBURG. No error.

Action to recover of defendant, C. S. Thompson, the balance due on the purchase price of a piano sold and delivered by plaintiff to said defendant under a conditional sales contract, and also to recover of said defendant and of the defendant, C. H. Boone, possession of said piano.

The conditional sales contract by which plaintiff retained title to the said piano until the purchase price was paid was reduced to writing and signed by the defendant, C. S. Thompson; it has not, however, been registered.

Defendant, C. S. Thompson, filed no answer or other pleading; judgment by default final was rendered against him. He has not appealed from the judgment.

Defendant, C. H. Boone, admitted that the piano was in his possession. He alleged that he had acquired title to the piano, as a purchaser for value, from his codefendant, C. S. Thompson, and that, therefore, the unregistered conditional sales contract, under which plaintiff claims title to the piano, is not valid as against him.

Issues determinative of the right of plaintiff to recover of the defendant, C. H. Boone, possession of the piano were submitted to the jury and answered as follows:

1. Is the plaintiff the owner and entitled to the possession of the piano sued for in this action? Answer: Yes.

2. If so, what was the reasonable market value of the piano at the time it was seized and replevied by the defendant? Answer: $200.

3. What is the reasonable market value of the piano at this time? Answer: $200.

From judgment on the verdict, defendant, C. H. Boone, appealed to the Supreme Court.

Tillet, Tillet & Kennedy and Frank Grainger Pierce for plaintiff.
John Newitt for defendant.

CONNOR, J. There was no error in the refusal by the trial court of defendant's motion for a separate trial of plaintiff's action against him. This motion was founded upon defendant's contention that there is a misjoinder of parties defendant and of causes of action in the complaint in this action. This contention was first presented by defendant's demurrer to the complaint, which was overruled. Defendant has not set out in his brief filed in this Court his exception to the refusal of the Court to sustain his demurrer. He has, therefore, abandoned this exception. Rule 28. There was no trial of plaintiff's action against the defendant, C. S. Thompson. He filed no answer or other pleading, and there was a judgment against him by default final. The action was tried only on the issues raised by the answer of the defendant, C. H. Boone. Notwithstanding the refusal of defendant's motion for a separate trial, there was in fact a separate trial of the action as to the defendant, C. H. Boone.

However, there is no misjoinder of parties defendant or of causes of action in the complaint in this action. It has been held by this Court that a demand for possession of property and for judgment on the debt secured by a lien or mortgage on the property may be joined in one action. *Kiger v. Harmon,* 113 N. C., 406, 18 S. E., 515. Both causes of action grow out of and are founded upon the same transaction. C. S., 507. Whereas in the instant case, it is alleged that the property which is subject to a lien, or which has been conveyed by mortgage to secure a debt, is in the wrongful possession of a person other than the debtor or mortgagor, such person is a proper party defendant in an action by the creditor whose debt is thus secured against the debtor or mortgagor to recover judgment on the debt, and also to recover possession of the property for purposes of foreclosure. Where such person has or claims an interest in the property adverse to the plaintiff, he is a necessary party to a complete determination of the questions involved, affecting plaintiff's right to the possession of the property. C. S., 456. In the instant case, the defendant, C. H. Boone, claims title to the piano adverse to the plaintiff, and contends that by reason of such title his possession of the piano is lawful as against both the defendant, C. S. Thompson, and the plaintiff. Said defendant is both a proper and a necessary party defendant in this action.

Nor was there error in the refusal of the trial court to allow defendant's motion at the close of all the evidence for judgment as of nonsuit. It is true that the conditional sales contract under which plaintiff claims title to and right to the possession of the piano as against both defendants was not registered. Notwithstanding this fact, plaintiff is entitled to recover possession of the piano from the defendant, C. S. Thompson, for it is well settled by many decisions of this Court that the contract, although not registered, is valid as between the parties. *Kornegay v. Kornegay,* 109 N. C., 191, 13 S. E., 770. The unregistered conditional sales contract is valid as against all persons except creditors and purchasers for value from C. S. Thompson. C. S., 3311. *Harris v. R. R.,* 190 N. C., 480, 130 S. E., 319. On the trial of this action there was conflicting evidence as to whether the defendant, C. H. Boone, was a purchaser for value from his codefendant, C. S. Thompson. This evidence was properly submitted to the jury. Plaintiff in an action to recover possession of personal property, under an unregistered chattel mortgage or conditional sales contract, is entitled to recover not only of the mortgagor or bargainor, but also of a defendant in possession of said property, claiming title thereto otherwise than as a creditor or purchaser for value from the mortgagor or bargainor. *Motor Co. v. Jackson,* 184 N. C., 328, 114 S. E., 478.

Assignments of error based upon other exceptions appearing in the case on appeal have been considered. These exceptions are principally to the rulings of the court with respect to the admission or exclusion of evidence, and to instructions of the court in the charge to the jury. They cannot be sustained. The judgment is affirmed.

No error.

C. F. HARVEY v. KINSTON KNITTING COMPANY ET AL.

(Filed 8 May, 1929.)

1. **Mortgages F b—Purchaser of equity of redemption does not assume the indebtedness in absence of agreement in deed.**

The grantee in a deed to lands subject to an existing mortgage recited therein does not personally assume the mortgage indebtedness by accepting the deed unless the language thereof clearly imports that he does so.

2. **Same—Purchaser of equity of redemption is entitled to have notes in the hands of mortgagee applied to mortgage debt for which they were given.**

Where the owner mortgages his property and later agrees with the mortgagee that a part of the mortgaged premises be released from the mortgage and sold partly for cash with notes for the balance taken and secured by a mortgage from the purchaser of the released part, and that the original mortgagee hold the notes and mortgage on the released part as security for the original mortgage debt, the execution of the original mortgage is in itself an application of the mortgaged premises to the security of the debt and includes the substitution in part therefor of the mortgage of the released part, and the original mortgagor is entitled to have the proceeds of the notes, as they are paid, applied to his debt, and the purchaser of the original equity of redemption is subrogated to the right of the mortgagor in this respect.

3. **Same—Right of purchaser of equity of redemption as against creditors of insolvent mortgagor.**

Where the mortgagor, under agreement with the mortgagee, sells a part of the premises mortgaged for a cash payment and notes for the balance secured by a mortgage from the purchaser, and the original mortgagee holds such notes as security for the original debt, and thereafter a receiver is appointed for the original mortgagor, who sells the property at judicial sale under order of court, the purchaser at the judicial sale, not assuming the amount of the original mortgage in his deed, is subrogated to the rights of the original mortgagor and is entitled to have the proceeds of the notes applied to the original mortgage as they are paid as against the other creditors of the insolvent mortgagor.

4. **Estoppel B a—Party may not take position inconsistent with that taken originally in same action.**

Where the purchaser of lands at a judicial sale insists on confirmation and appeals from an adverse judgment, he may not thereafter maintain the inconsistent position on another appeal in the same case that the sale should not be confirmed.

CIVIL ACTION, before *Cranmer, J.*, at February Term, 1928, of LENOIR.

Certain phases of this case were considered by this Court in *Harvey v. Knitting Co.*, 194 N. C., 734, 140 S. E., 746, and *Harvey v. Oettinger,* 194 N. C., 483, 140 S. E., 86.

The Orion Knitting Mills issued bonds in the sum of $150,000 on 1 May, 1922, and to secure the payment thereof executed and delivered to the Virginia Trust Company a mortgage or deed of trust on all of its property consisting of real estate, machinery, etc. These bonds were endorsed by the directors of the mortgagor, C. F. Harvey, the plaintiff, and the individual defendants in this action. Some of said directors and endorsers, as aforesaid, were dead at the commencement of this action and their personal representatives were duly made parties.

Thereafter the defendant, Kinston Knitting Company, was duly organized in 1925, and this corporation became the owner of the real and personal property of the mortgagor, Orion Knitting Mills, under a contract or agreement to assume and pay off the balance due on the bonds issued by the Orion Knitting Company and secured by said deed of trust. Thereupon the Orion Knitting Mills was duly dissolved. The real estate embraced in said mortgage or deed of trust was located in Lenoir and Carteret counties.

This action was instituted by plaintiff Harvey against the Kinston Knitting Mills and the individual defendants, alleging that said corporation was insolvent and asking for the appointment of a receiver, and a receiver was appointed on 31 March, 1927. Prior to the commencement of this action the company had sold to C. E. Raynor twenty-six tenement houses covered by the lien of Virginia Trust Company for $20,000, said purchase price consisting of $1,000 in cash and notes aggregating $19,000, secured by deed of trust upon the property. These Raynor notes were endorsed by the defendant, Kinston Knitting Company, and were delivered to the lienholder, Virginia Trust Company. Whereupon, the Virginia Trust Company released the property purchased by Raynor from the operation of said deed of trust. After applying the cash proceeds derived from sales of portions of the mortgaged property, as aforesaid, there was a balance due the Virginia Trust Company of approximately $90,000, with some accrued interest. Subsequently Judge Sinclair entered an order of sale of all the property of the defendant, Kinston Knitting Company, including, of course, the land covered by the deed of trust of the Virginia Trust Company. The order of sale directed that the property should be offered free of lien, and also "subject to the lien held by the Virginia Trust Company, trustee, so that the purchaser thereof shall take the said property burdened with and subject to the said lien aforementioned." Pursuant to said order of sale the receiver advertised for sale the property in Carteret County on 18 July, 1927, and the property in Lenoir County was to be sold on 19 July, 1927. The advertisement followed the language of the order of sale, reciting that if said property had been sold freed from lien "the same said property will immediately be offered for sale subject to the lien held under the deed of trust of the Virginia Trust Company, so that the purchaser thereof will purchase and take the property subject to the said lien held by the Virginia Trust Company." The report of sale duly made by the receivers was filed on 19 July, 1927, reciting that "the receivers further made a true and accurate statement of the status as to the indebtedness secured by the lien under the deed of trust to the Virginia Trust Company." In addition to the advertisement the receivers announced that the total indebtedness due the Virginia Trust Company as of 1 May, 1927, was $92,700. Announcement was also made at the sale that the Raynor notes and the cash payment of $1,000 made by him had been forwarded to the Virginia Trust Company.

The real estate in Carteret County, covered by said deed of trust was purchased by the plaintiff, C. F. Harvey, "subject to and burdened by the said lien," for the sum of $100, and the real estate in Lenoir County, covered by said deed of trust, was also purchased by Harvey for $300, "subject to the lien held by the Virginia Trust Company."

Thereafter, the defendants, H. E. Moseley, L. L. Oettinger, F. C. Dunn, Myrtie A. Tull, executrix, Lundsford Abbott, administrator, and Lillie T. Oettinger, executrix, filed exceptions to the confirmation of said sale, alleging that the price offered for said property was inadequate, and that Harvey, having purchased the Carteret County property for $100.00 "subject to and burdened with the indebtedness due to the Virginia Trust Company . . . in law . . . by virtue of his said bid . . . thereupon assumed as a part of his bid and agreed to pay off the secured indebtedness to the Virginia Trust Company," and that the Virginia Trust Company had in its possession $21,000 which ought not to be applied to the reduction of its indebtedness to the detriment of unsecured creditors. The objections to confirmation so filed stated in conclusion: "If the court be of the opinion that the bid placed by C. F. Harvey for the property at Beaufort (Carteret County) does not amount in law to an assumption of the mortgage indebtedness, that then the whole sale of both the properties at Beaufort and Kinston be not confirmed."

Hearing was had upon the exceptions by Judge Cranmer at Kenansville, 7 September, 1927. At this hearing the judge found the following facts:

"1. That the sale was in all respects regular, fair and in accordance with the requirements by the court.

"2. That the bid or bids of the purchaser, C. F. Harvey, . . . is a fair and reasonable price for the said property purchased in accordance with the terms of sale.

"3. Full and specific announcement was also made before the sale of the true status of liens held by the Virginia Trust Company." Thereupon the receivers were "authorized, empowered and directed to execute and deliver unto the said purchaser, C. F. Harvey, a deed in fee simple subject to the lien held by the Virginia Trust Company."

The objectors appealed from said decree of confirmation and this appeal was considered by the Court in 194 N. C., 734.

After the decision of the Supreme Court the receivers tendered deed to Harvey and demanded the purchase money in accordance with the terms of the sale. Harvey declined to accept the deed upon the ground that announcement had been made at the sale by the receivers "that the successful bidder for the equity of redemption of the Kinston Knitting Company would get the benefit of the proceeds of the Raynor notes and of certain personal property sold by the receivers because such proceeds would be credited upon the mortgage indebtedness of $91,200. Furthermore, the purchaser contended that by reason of the delay the property had greatly depreciated in value and that it would be equitable to require him to comply with the terms of the sale and pay the purchase money. The rule to show cause was served upon the purchaser, and the matter came on for hearing before Cranmer, J., at the February Term, 1928.

The court rendered the following judgment: "This cause coming on to be heard upon an instanter rule directed to C. F. Harvey to show cause why he should not be required to accept a deed to the property heretofore sold by the receivers at public auction on 18 and 19 July, 1927, respectively, and to pay to the receivers therefor the sum of $400.00, his bid therefor; and the said C. F. Harvey having filed an answer to said rule, and also having submitted an additional affidavit of F. M. Taylor, as well as the affidavits of C. F. Harvey, C. Oettinger, L. J. Mewborn, G. V. Cowper, S. D. Ford and E. M. Long, filed in this cause 20 February, 1928, and upon a consideration thereof the court finds the following facts:

One: That the said property was offered for sale at public auction on said dates, and had been advertised by the posting and publishing of notices, in writing, in which it was stated that the Virginia Trust Company lien indebtedness was $91,200 and unpaid interest, and such other statements were made therein as appears from a copy thereof attached to the report of the receivers filed herein reporting said sale, as well as certain announcements all of which are referred to and made a part hereof.

Two: That at said sale, certain announcements were made and relied on by the purchaser, and the court finds that the statements contained in the affidavits hereinbefore filed in this court on 20 February, 1928, which affidavits were made by C. F. Harvey, G. V. Cowper, L. J. Mewborn, C. Oettinger, S. D. Ford, and E. M. Long, which affidavits, having been heretofore filed, were again filed and used on this hearing, together with the additional affidavit of F. M. Taylor, this day filed, are true, and that the answer of said C. F. Harvey is true.

Now, therefore, upon said answer, said affidavits, and the record herein, the court concludes as a matter of law that it has no power to relieve said purchaser of his said bid, for that, notwithstanding whatever the purchaser may have thought the terms of the bid were, and notwithstanding any announcement made at the sale, the terms of the bid as construed by this court were and are that the said C. F. Harvey purchased an equity of redemption of the Kinston Knitting Company, for the sum of $400.00, which said equity of redemption was subject to a lien in favor of the Virginia Trust Company, trustee, for $91,200 and interest, and that the said C. F. Harvey, in order to perfect title to said property, and clear the same from lien, would be compelled to pay to the Virginia Trust Company, trustee, on account of the lien credited by its deed of trust, the sum of $91,200, and interest, and that any sum of money, or any securities in the hands of the Virginia Trust Company, derived from sale of property made prior to 18 July, 1927, must by the Virginia Trust Company be paid and turned over to the receivers herein, upon the payment, if made, by C. F. Harvey, of the said sum of $91,200, and interest.

"Wherefore, it is ordered that the said C. F. Harvey pay to the said receivers the said sum of $400.00, together with the cost of this rule as taxed by the clerk of this court."

From the foregoing judgment Harvey appealed, assigning error.

H. G. Connor and L. R. Varser for C. F. Harvey.

E. M. Long for Virginia Trust Company.

Thomas J. White, Jr., R. A. Whitaker and R. T. Allen for receivers.

Rouse & Rouse for creditors and individual defendants.

Brogden, J. 1. Does the purchase of an equity of redemption at a judicial sale "subject to and burdened with the lien" of mortgage or deed of trust, constitute an assumption by the purchaser of the indebtedness secured by such lien and imply a promise to pay the same?

2. If not, what is the status of said purchaser of said equity of redemption with reference to the proceeds in the custody of the lienholder derived solely from a prior sale of a portion of the mortgaged premises?

The law answers the first question in the negative. The Supreme Court of California, in the case of *Fontana Land Co. v. Laughlin,* 250 Pac., 669, declared: "The greater weight of authority and the better reasoning is that, unless the grantee in the deed assumed or agreed to pay the mortgage, or unless the amount of the mortgage was deducted from the purchase price, a purchaser who merely takes subject to the mortgage is not estopped from showing that it has been paid or that the amount claimed is not legally owing upon it."

The same principle is stated in Jones on Mortgages, (7 ed.), Vol. 2, sections 748 and 865, as follows: "A deed which is merely made subject to a mortgage specified does not alone render the grantee personally liable for the mortgage debt; to create such liability there must be language which clearly imports that the grantee assumes the obligation of paying the debt." *Crawford v. Nimmons,* 54 N. E., 209; *Brunswick Realty Co. v. University Co.,* 134 Pac., 608; *Metropolitan Bank v. Dispatch Co.,* 149 U. S., 436, 37 Law Ed., 799; *Capital National Bank v. Holmes,* 95 Pac., 314, 16 L. R. A. (N. S.), 470. An imposing list of authorities to sustain the proposition appears in the case of *Allgood v. Spearman,* 101 S. E., 193, and also in a comprehensive note upon the subject found in L. R. A. 1917 C., 592. See, also, *Ayers v. Makely,* 131 N. C., 60, 42 S. E., 454.

The answer to the second question requires a brief review of the pertinent facts. Prior to the institution of the receivership action the Virginia Trust Company held a deed of trust upon certain real estate of Kinston Knitting Company. Payments had been made from time to time upon the indebtedness, reducing it to around $90,000 exclusive of accrued interest. The Kinston Knitting Company conveyed a small portion of the mortgaged property to C. E. Raynor for the sum of $20,000. Raynor paid $1,000 in cash and executed notes evidencing the deferred payments, which said notes were secured by deed of trust upon the property so conveyed. These notes were immediately sent to the lienholder. The cash paid by Raynor was applied by the lienholder to the item of accrued interest on the loan. Thereafter the receivership action was instituted and by consent of all parties certain machinery covered by the mortgage, was sold for cash by the receivers, and the proceeds delivered to the lienholder, and by it was applied to the indebtedness. The Raynor notes, of course, were not to be applied to the indebtedness until they matured and were paid. On the day of the sale there was approximately $91,200 due the Virginia Trust Company and it had in its hands the Raynor notes aggregating approximately $19,000. The trial judge finds as a fact that the receiver, on the day of the sale, announced to bidders that the proceeds of the Raynor notes would be credited on the mortgage indebtedness, and that Harvey, the purchaser at the sale, relied upon such announcement. The vital question, therefore, is: Must the proceeds derived from collection of the Raynor notes, if they are paid, be credited to the mortgage indebtedness, or must said notes be turned over to the receiver to be distributed among the general creditors of the Kinston Knitting Mill?

The execution of the mortgage was in itself an application of all the property embraced in the mortgage to the payment of the debt secured therein. *Bonner v. Styron,* 113 N. C., 30, 18 S. E., 83; *Lee v. Manley,* 154 N. C., 244, 70 S. E., 385. The Raynor notes represented and were a substitute for that portion of the mortgaged premises theretofore sold and conveyed before the receivership proceedings. Thus, it would seem apparent that the law, nothing else appearing, applied the proceeds of the Raynor notes to the mortgage debt, irrespective of any announcement of such application by the receiver on the day of the sale. Clearly, the purchaser of an equity of redemption at a public sale is entitled to the property as it exists at that time. Moreover, it has been held by this Court in *Dameron v. Carpenter,* 190 N. C., 595, 130 S. E., 328, that "equity subrogates the purchaser of the equity of redemption to the rights of the mortgagor to clear the title and procure the legal estate only as to the mortgaged premises, and no further." *McKinney v. Sutphin,* 196 N. C., 318. Certainly, in the case at bar the mortgagor would have the right to require the lienholder to apply the proceeds of the Raynor notes, when collected, to the mortgage debt, and when Harvey purchased the equity of redemption he became entitled to the same right. Harvey's contention that he ought not to be required to take and pay for the equity of redemption cannot be sustained. Upon the former appeal the objecting creditors were resisting confirmation and Harvey was requesting the court to confirm the sale, and, therefore, he cannot at this time, in the same case, be permitted to take a contrary position. *Ellis v. Ellis,* 193 N. C., 216, 136 S. E., 350.

There are certain other questions with respect to the claim filed by Harvey. The judge continued the decision of this matter until the determination of a suit against Harvey, brought by the receiver, in compliance with an order of the court. It is to be assumed that in the final judgment the equities of all parties will be properly protected, and for this reason we deem it unnecessary to discuss that aspect of the case.

The result is, as we interpret the law, that Harvey is required to accept the deed for the equity of redemption and to pay to the receivers the purchase money in accordance with his bid; and further that the proceeds of the Raynor notes, when and as paid, shall be credited to the mortgage indebtedness by the lienholder.

Modified and affirmed.

W. S. HANNA v. CAROLINA MORTGAGE COMPANY (FORMERLY CAROLINA MORTGAGE & INDEMNITY CO.).

(Filed 8 May, 1929.)

Mortgages H o—Resale of lands sold under foreclosure must be had as often as advance bid is made and statute complied with—Injunctions.

Under the provisions of C. S., 2591, relating to the foreclosure of mortgages, it is the duty of the clerk of the Superior Court to readvertise and resell the mortgaged property as often as the statute is complied with and the money for the advance bid deposited and the bid made within ten days from the date of the sale, and the last and highest bidder at a prior sale acquires no rights in the property until his bid has finally been accepted and the order made for the deed to be made to him; and such order having been made by the clerk prematurely, it is proper for him to make an entry revoking it and order a resale, and an injunction will not lie to restrain the resale where the order has been thus revoked and the statute complied with.

APPEAL by plaintiff from *Harding, J.*, at September Term, 1928, of GASTON. Affirmed.

Facts: (1) Robert E. Johnson and others, on 1 September, 1925, executed a deed of trust to defendant, Carolina Mortgage Company, on a certain lot in the town of Gastonia, to secure the payment of certain notes. The mortgage was duly recorded in the office of the register of deeds for Gaston County, Book 197, p. 93.

(2) Robert E. Johnson and others made default on the payment of the notes and the Carolina Mortgage Company, in accordance with terms of the mortgage, duly advertised the lot, according to law, for sale at 12 o'clock noon on 11 June, 1928. At the sale one R. N. Aycock became the last and highest bidder.

(3) Within 10 days the Aycock bid was increased 5 per cent by one E. P. Lineberger and the lot readvertised for sale at 12 o'clock noon on 9 July, 1928. At the sale R. N. Aycock became the last and highest bidder for $7,125.03.

(4) Within ten days the Aycock bid was increased 5 per cent by plaintiff W. S. Hanna and the lot readvertised for sale at 12 o'clock noon on 3 August, 1928. All the above sales were duly reported to the clerk of the Superior Court and the clerk ordered resales according to law. At this sale plaintiff W. S. Hanna became the last and highest bidder for $7,481.28, and at this sale no increase bid was put on the lot and the lot was bid in at the advance bid theretofore made by Hanna. The attorneys for the Carolina Mortgage Company notified plaintiff by letter of 3 August, 1928, that there was no increase bid put on the lot, that he was declared the purchaser of the lot by the clerk of the Superior Court of Gaston County, in the sum of $7,481.28 and they were advising the trustee that day of the sale and requesting said trustee to forward deed for delivery to plaintiff.

(5) The clerk made an order to make deed to W. S. Hanna on 3 August, 1928. That on 4 August, 1928, the said clerk, being of the opinion that said sale should remain open for 10 days for increased bids, revoked said order and ruled that said sale should remain open for 10 days before being confirmed in lieu of said order made on 3 August, 1928, made the following order in Book No. 2, page 37, of "Record of Re-sale by Trustees and Mortgagees," on 4 August, 1928:

ORDER

"Whereas, R. N. Aycock has filed a 5 per cent bid on the purchase money paid for the above described land, and has paid the same to me; Now, therefore, it is ordered, considered and adjudged that the Carolina Mortgage Company, trustee, advertise said land for resale fifteen days in some newspaper published in Gaston County, under the provisions of chapter 146, Public Laws 1915, and chapter 124, Public Laws 1919. This 4 August, 1928. S. C. HENDRICKS, C. S. C."

The plaintiff was duly notified of the clerk's order revoking the order made on 3 August, 1928, to make deed to W. S. Hanna and the advance bid of 5 per cent made by R. N. Aycock on 4 August, 1928, which was within the 10 days after the resale, and that the lot would be advertised and resold on 20 August, 1929. According to the order, the lot was readvertised for sale. Before the sale plaintiff brought an action against defendant for specific performance, alleging the facts and also alleging that he was ready, able and willing to perform his contract and pay the $7,481.28, and asked for and obtained a temporary restraining order.

The following judgment was rendered by the court below: "This cause coming on to be heard and being heard at September Term, 1928, of the Superior Court of Gaston County, by his Honor Wm. F. Harding, judge, present and presiding, and it appearing to the court that the temporary restraining order heretofore issued in this action should be dissolved and vacated, and that the order made by the clerk of the Superior Court of Gaston County directing said trustee to again sell the lands described in the complaint was regular and lawful because of having received an advance bid of five per cent made by R. N. Aycock, and that said trustee should be allowed to proceed to readvertise and resell said lands pursuant to said order; it is therefore, considered, ordered, adjudge and decreed by the court that the temporary restraining order heretofore issued in this action be, and is hereby dissolved and vacated."

The plaintiff excepted and assigned error and appealed to the Supreme Court.

C. D. Holland and G. W. Wilson for plaintiff.
A. E. Woltz, Paul E. Monroe and Allen & Duncan for defendant.

CLARKSON, J. The plaintiff assigns as error that the court below denied the right of the plaintiff to the specific conveyance of the land and denied making order requiring trustee to convey the land to the plaintiff and to restrain the defendant from reselling the said land. We think plaintiff's assignment of error cannot be sustained.

The principle upon which specific performance of a binding contract to convey land is enforceable, has no application to the successful bidder at a sale under the power contained in a mortgage or deed of trust of lands, during the 10-day limitation prescribed in C. S., 2591, there is no binding contract of purchase, and the bargain is incomplete. Under the provisions of this section, the bidder at the sale during the period of ten days acquires no interest in the property itself, but only a position similar to a bidder at a judicial sale, before confirmation. He is only considered as a preferred bidder, his right depending upon whether there is an increased bid and a resale of the land ordered under the provisions of the statute. *In re Sermon's Land,* 182 N. C., 122; *Cherry v. Gilliam,* 195 N. C., 233.

C. S., 2591 is as follows: "In the foreclosure of mortgages or deeds of trust on real estate, or in the case of the public sale of real estate, by an executor, administrator, or administrator with the will annexed, or by any person by virtue of the power contained in a will, the sale shall not be deemed to be closed under ten days. If in ten days from the date of the sale, the sale price is increased ten per cent where the price does not exceed five hundred dollars, and five per cent where the price exceeds five hundred dollars, and the same is paid to the clerk of the Superior Court, the mortgagee, trustee, executor, or person offering the real estate for sale shall reopen the sale of said property and advertise the same in the same manner as in the first instance. The clerk may, in his discretion, require the person making such advance bid to execute a good and sufficient amount to guarantee compliance with the terms of sale should the person offering the advance bid be declared the purchaser at the resale. Where the bid or offer is raised as prescribed herein, and the amount paid to the clerk, he shall issue an order to the mortgagee or other person and require him to advertise and resell the said real estate, it shall only be required to give fifteen days notice of a resale. Resales may be had as often as the bid may be raised in compliance with this section. Upon the final sale of the real estate, the clerk shall issue his order to the mortgagee or other person, and require him to make title to the purchaser. The clerk shall make all such orders as may be just and necessary to safeguard the interest of all parties, and he shall keep a record which will show in detail the amount of each bid, the purchase price, and the final settlement between parties," etc.

Under the provisions of C. S., 2591, the clerk of the court has no jurisdiction, except to order a resale of land sold under the power of sale in a mortgage, when, within the ten days required by the statute, the bid at the sale has been raised; and a mere statement made at the foreclosure sale that the purchase price be paid in cash upon confirmation, implies only that the cash would be required if the bid should not be raised in the amount and time prescribed by law. *In re Mortgage Sale of Ware Property,* 187 N. C., 693.

In *Cherry v. Gilliam,* 195 N. C., at p. 234-5, citing numerous authorities, the following observations are made: "It is provided in section 2591, that in the foreclosure of the mortgages the sale shall not be deemed to be closed under ten days, and if within this time an increased bid is paid to the clerk the mortgagee, by order of the clerk, shall reopen the sale, advertise the property as in the first instance, and make a resale; and that upon the final sale the clerk shall issue an order to the mortgagee to make title to the purchaser. It has been held with respect to this statute that it was enacted for the protection of the mortgagees when sales are made under a power of sale without a decree of foreclosure by the court; that it confers no power on the clerk to make any orders unless the bid is increased; that in the absence of such bid no report is necessary; and that if an increased bid is paid, the clerk cannot make any orders until the expiration of ten days." *In re Bauguess,* 196 N. C., 278.

Chapter 146, Public Laws 1915, relating to the resale of land was amended as follows: "Section 1. That chapter one hundred and forty-six of Public Laws of one thousand nine hundred and fifteen be and the same is hereby amended by striking out all of section four and inserting in lieu thereof the following: 'Section 4. That resale may be had as often as the bid may be raised in compliance with this chapter.'" The section stricken out was as follows: "That not more than one sale shall be required under this act."

The plaintiff contends that plaintiff's upset bid was duly advertised for 15 days. The bidding and sale therefore was open for 15 days and there was no other bid. No one was interested enough to appear within the 15 days, or at the expiration thereof, and the upset bidder became the last and final bidder. He can be held to his bid by the court, and has right to confirmation unless another bid is put upon the mortgaged premises on the sale day. Of course, if there was an advanced bid, then the sale would lie open 10 days. There being no such bid on the sale day, and the plaintiff having been declared the purchaser by the trustee and by the clerk of court, the plaintiff insists that the clerk could not cancel his first order of confirmation and order the resale, and that the plaintiff is entitled to an order of confirmation of the sale on 3 August, 1928, and upon full payment to a deed for the premises. We cannot so hold. We do not think that the language or intent of the statute warrants plaintiff's contention. The construction is too narrow.

The fact that plaintiff became the last, only and highest bidder at the third sale, and that his bid at that time was the same as his upset bid filed within ten days after the second sale, does not preclude another upset bid from being filed within ten days after the third or any other sale.

The clerk had no power to make the order for the trustee to make deed to plaintiff until the ten days required by the statute expired. It was his duty under the statute to allow the bid to remain open for ten days and to see to it that resales be had as often as the bid was raised within the ten days and the statute complied with. Having no power to make the order, he very properly struck it out and upon an advance bid within ten days ordered a resale. The statute fixes no limit to the number of resales, which must be had as often as there is an advance bid within the ten days, and the statute complied with. It is a statute that does not hurt the mortgagee, but is beneficial to the mortgagor and often saves mortgaged property from being sacrificed. The judgment below is

Affirmed.

JAMES W. FOSTER, BY HIS NEXT FRIEND, v. GAVIN L. HYMAN AND C. C. CODDINGTON, INC.; FRED BYRD, BY HIS NEXT FRIEND, v. GAVIN L. HYMAN AND C. C. CODDINGTON, INC.; EARL FOSTER, BY HIS NEXT FRIEND, v. GAVIN L. HYMAN AND C. C. CODDINGTON, INC.

(Filed 8 May, 1929.)

1. **Execution K a—Execution against the person will lie where the injury was inflicted wilfully.**

   Where the pleadings, evidence, and verdict are that an injury was wilfully inflicted, an order for execution against the person of the defendant upon the return of execution against his property unsatisfied is proper. C. S., 768, 673.

2. **Same—Driving of automobile in this case held so reckless as to amount to intent to injure.**

   Allegations and evidence tending to show that the defendant, while drunk, drove his automobile on the wrong side of a street of a city where traffic was heavy at a rate of forty-five or fifty miles an hour, under circumstances which should have convinced him, as a man of ordinary prudence, that he incurred the risk of imminent peril to human life, and that the plaintiff was injured thereby: *Held,* sufficient to sustain the jury's verdict that the injury was inflicted wilfully and wantonly, and an order for execution against the person of defendant upon return of execution against his property unsatisfied was proper. C. S., 768, 673.

3. **Same—Wilful and Wanton Injury.**

   An act causing injury to person or property is wilfully done when it is done purposely and deliberately in violation of law, and wantonly done when done recklessly, manifesting a reckless indifference to the rights of others, but wilfulness may be constructive, and where the wrongdoer's conduct is so reckless as to amount to a disregard for the safety of others it is equivalent to actual intent.

4. **Pleadings A b—Verification of complaint by next friend in this case held in proper form and sufficient.**

   Objection to the sufficiency of the verification of the complaint by plaintiff's next friend on the ground that the affiant had no personal knowledge of the matters alleged will not be sustained when the allegations are not made to appear to be outside the personal knowledge of the affiant.

5. **Judgments D b—Upon judgment by default and inquiry, inquiry should be made at next succeeding term.**

   A judgment by default and inquiry entitles the plaintiff to nominal damages without further proof, but the inquiry should be made at the next succeeding term, and when it appears on appeal that the inquiry was made at the same term the cause will be remanded so that the inquiry may be made according to law. C. S., 596. As to whether a party may waive this provision of the statute, *quære?*

APPEAL by defendant Hyman from *Townsend, Special Judge,* at Special October Term, 1928, of MECKLENBURG. Error.

Consolidated actions to recover damages for injuries to person and property alleged to have been caused by the negligence of the defendants, Hyman being an employee of C. C. Coddington, Inc., in causing a collision of the car he was driving (the property of C. C. Coddington, Inc.), with the car of the plaintiffs. At the conclusion of the evidence judgment of nonsuit was granted as to C. C. Coddington, Inc., and the following verdict was returned against Hyman:

1. Were the acts of the defendant, Gavin L. Hyman, complained of, committed in a wilful and wanton manner as alleged in the complaint? Answer: Yes.

2. What damages, if any, is the plaintiff, Earl Foster, entitled to recover of the defendant, Gavin L. Hyman on account of injuries to his person? Answer: $250.00

3. What damages, if any, is the plaintiff, Earl Foster, entitled to recover on account of injury to his property? Answer: $390.00 with interest.

4. What damages, if any, is the plaintiff, James W. Foster, entitled to recover of the defendant, Gavin L. Hyman, on account of injuries to his person? Answer: $50.00.

5. What damages, if any, is the plaintiff, Fred Byrd, entitled to recover on account of injuries to his person? Answer: $50.00.

Judgment was rendered in behalf of the plaintiffs for the amounts respectively awarded them; and it was further adjudged that execution issue against the property of the defendant as provided by law, and if returned unsatisfied in whole or in part that execution issue against the person of the defendant. Hyman excepted and appealed.

T. L. Kirkpatrick and B. G. Watkins for plaintiffs.
John M. Robinson and Hunter M. Jones for defendant.

ADAMS, J. The defendant in a civil action may be arrested "Where the action is for injury to person or character, or for injuring, or wrongfully taking, detaining, or converting real or personal property." C. S., 768. If the action is one in which the defendant might have been arrested an execution against the person of the judgment debtor may be issued after the return of an execution against his property wholly or partly unsatisfied. C. S., 673. The judgment, to the signing of which the appellant excepted, provides for an execution against his person; and his appeal presents the question whether the trial court committed error in ordering such execution upon the "pleadings and the evidence." It was perhaps in consequence of the decision in *Peebles v. Foote,* 83 N. C., 102, that C. S., 673 was amended by the addition of the words, "whether such statement of facts be necessary to the cause of action or not." Laws 1891, ch. 541, sec. 2.

The appellant contends that error was committed because the complaints do not state causes of action for wilful injury. It has been held that an execution against the person which would deprive the defendant of his homestead and personal property exemption cannot issue when the judgment is for an injury sustained merely by negligence or accident, but only when the injury has been inflicted intentionally or maliciously; that there must be some element of violence, fraud, or criminality. *Oakley v. Lasater,* 172 N. C., 96. In that case the allegation in the complaint was that the injury had been inflicted wrongfully, recklessly, and wantonly, after being forbidden by the plaintiff's agent," but the issue was, "Did the defendant negligently injure the mule of the plaintiff?" In *Paul v. Auction Company,* 181 N. C., 1, 6, it is said that on recovery for a tort founded on negligence merely, arrest and imprisonment on final process would not be justified, "the cases holding further that to justify such imprisonment there must be a finding by the jury that the tort was wilfully committed." This statement of the law is in approval of the opinion to the same effect in *McKinney v. Patterson,* 174 N. C., 483. In the present case the complaint includes, not only the element of negligence, but the elements of wilfulness and wantonness. After alleging that the defendant wilfully, wantonly, and negligently failed and refused to perform certain duties imposed upon him, the plaintiffs say that the injuries they suffered were the direct and proximate result of the wilful and wanton acts as well as the negligent acts and the negligent omission of the defendant.

An act is done wilfully when it is done purposely and deliberately in violation of law (*S. v. Whitener,* 93 N. C., 590; *S. v. Lumber Co.,* 153 N. C., 610), or when it is done knowingly and of set purpose, or when the mere will has free play, without yielding to reason. *McKinney v. Patterson, supra.* "The true conception of wilful negligence involves a deliberate purpose not to discharge some duty necessary to the safety of the person or property of another, which duty the person owing it has assumed by contract, or which is imposed on the person by operation of law." Thompson on Negligence (2 ed.), sec. 20, quoted in *Bailey v. R. R.,* 149 N. C., 169.

An act is wanton when it is done of wicked purpose, or when done needlessly, manifesting a reckless indifference to the rights of others. *Everett v. Receivers,* 121 N. C., 519; *Bailey v. R. R., supra.* A breach of duty may be wanton and wilful while the act is yet negligent; the idea of negligence is eliminated only when the injury or damage is intentional. *Ballew v. R. R.,* 186 N. C., 704, 706. In *Foot v. R. R.,* 142 N. C., 52, in which the jury found in response to separate issues that the plaintiff had been injured by the wanton and wilful negligence of the defendant, distinction was noted between the wilfulness which is referred to a breach of duty and wilfulness which is referred to the injury; in the former there is wilful negligence, and in the latter intentional injury. But as stated in *Ballew v. R. R., supra,* the intention to inflict injury may be constructive as well as actual. It is constructive where the wrongdoer's conduct is so reckless or so manifestly indifferent to the consequences, where the safety of life or limb is involved, as to justify a finding of wilfulness and wantonness equivalent in spirit to an actual intent. See citations in *Ballew's case.*

In applying this principle in a criminal action we have held that the reckless operation of an automobile on the streets of a city may disclose such depravity of mind and such disregard of human life as will supply the malice that distinguishes murder in the second degree from manslaughter. *S. v. Trott,* 190 N. C., 674. In the case at bar there was evidence tending to show that the defendant was drunk; that he drove his car at night on the wrong side of the street in a business section of the city of Charlotte at the rate of forty-five or fifty miles an hour, under circumstances which should have convinced him, as a man of ordinary prudence, that he incurred the risk of imminent peril to human life; that his car struck the one in which the plaintiffs were riding, turned it upside down, hurled it against a telephone post, broke the glass, knocked the wheels off, tore out the top, and injured the plaintiffs. If it be conceded that there is no evidence of actual intent to injure the plaintiffs we cannot hold as a matter of law that the constructive intent is not supplied, or that the complaint does not state a cause of action for wilful injury. The exceptions in the first and third assignments of error are therefore overruled.

The appellant's second assignment is that the complaints are verified by persons not having personal knowledge of the facts. In *Peebles v. Foote, supra,* decided before the amendment of 1891, it is said that where the cause of arrest stated in the complaint is essential to the plaintiff's cause of action, verification of the complaint upon information and belief will not answer unless it gives the sources of information. It will be noted, however, that the allegations material to the plaintiff's cause of action are not set forth upon information and belief and there is nothing in the record to show that the affiant did not have personal knowledge of the facts therein recited.

The defendant filed no answer, and before introducing evidence the plaintiffs moved for judgment by default and inquiry as to defendant Hyman and his motion was allowed. The statute provides that when judgment by default and inquiry is entered the inquiry shall be executed at the next succeeding term. C. S., 596. The inquiry in the present case was executed at the same term at which judgment by default and inquiry was taken. The defendant, it is true, was in the courtroom and did not except to the inquiry or to the submission of the issues to the jury; but according to the record he was there in the capacity of a witness for the plaintiff against C. C. Coddington, Inc., and in fact testified at the plaintiff's instance. Presumably he acted upon the theory that as to himself the inquiry had been continued. Granting, only for the present purpose, that the statutory provision for executing the inquiry at a succeeding term is directory and that its requirement may be waived by the defendant, still there is no finding of a waiver and, indeed, no evidence upon which such finding could properly be based. The judgment by default and inquiry was conclusive that the plaintiffs had a cause of action and were entitled to nominal damages without proof. See dissenting opinion in *Junge v. MacKnight,* 135 N. C., 105, which was declared to be the law upon a petition to rehear, in which the former decision was overruled. *Junge v. MacKnight,* 137 N. C., 285. But as the inquiry was improperly executed immediately upon rendition of the interlocutory judgment, the cause is remanded to the end that the inquiry be made as the law provides by submitting to another jury issues similar to those appearing in the record. *Brown v. Rhinehart,* 112 N. C., 772, 776.

Error.

T. G. THORNBURG v. MRS. NANNIE BURTON.

(Filed 8 May, 1929.)

Attachment C b—Court may allow amendment to affidavit of attachment or allow evidence at hearing having same effect.

An affidavit on attachment defective in failing to set forth the facts as to defendant's being about to leave the State, etc., may be amended by permission of court, and where the court has found with plaintiff upon conflicting oral evidence, his findings has the effect of an amendment allowed by him. C. S., 799.

APPEAL by defendant from order of *Harding, J.,* at November Term, 1928, of MECKLENBURG. Affirmed.

This was a motion by defendant that an attachment levied upon her personal property under a warrant issued in this action be vacated and that the warrant be dismissed.

From an order denying her motion, defendant appealed to the Supreme Court.

T. L. Kirkpatrick and B. G. Watkins for plaintiff.
G. T. Carswell and Joe W. Erwin for defendant.

PER CURIAM. It is conceded that the affidavit on which the warrant of attachment was issued is insufficient, for that the grounds for plaintiff's assertion therein that defendant was about to dispose of her property and that she was about to leave the State, with intent to defraud her creditors, are not set out in the affidavit. C. S., 799. In *First National Bank v. Tarboro Cotton Factory,* 179 N. C., 203, 102 S. E., 195, it is said that the mere assertion of a belief that a defendant is about to assign or dispose of his property with intent to defraud his creditors is insufficient; the grounds upon which such belief is founded must be set out in order that the court may adjudge if they are sufficient. In that case, it was further said that the defective affidavit was not aided by the answer of the defendant.

In the instant case, the warrant was issued and the attachment levied on defendant's property on 23 November, 1927. Her motion that the attachment be vacated and dismissed was heard on the following day. At the hearing the defendant offered evidence in support of her motion; plaintiff offered evidence to sustain the warrant of attachment. The judge found from the evidence that there was reasonable ground for the attachment, and thereupon denied the motion. Defendant excepted to the signing of the judgment or order. This exception cannot be sustained.

In *Sheldon v. Kivett,* 110 N. C., 408, 14 S. E., 970, it is said to be well settled that an affidavit upon which a warrant of attachment has been issued, although wholly insufficient, may be amended by leave of court. The power to amend is recognized as in furtherance of justice. The amendment, when made, relates back to the beginning of the proceeding and may supply the facts omitted from the affidavit. *Cook v. Mining Co.,* 114 N. C., 617, 19 S. E., 664.

The order and judgment in the instant case is in effect an amendment of the affidavit. The court found from evidence offered by defendant as well as by the plaintiff that there was reasonable ground for the assertions in the affidavit and thereupon refused to vacate the attachment and dismiss the warrant. *Clark v. Clark,* 64 N. C., 150. In the cited case, defendant filed an affidavit in support of his motion that the attachment levied under a warrant issued upon an insufficient affidavit be vacated; in reply to defendant's affidavit, plaintiff filed a second affidavit which was sufficient. In the instant case, defendant instead of filing an affidavit, offered oral evidence in support of her motion; from this evidence, as well as from evidence offered by plaintiff, the court found facts which justified the issuance of the warrant. In principle, there is no distinction between *Clark v. Clark* and the instant case. In both cases the court found from evidence that the assertions in the affidavit were based upon facts which were adjudged sufficient to support the issuance of the warrant under which the attachment was levied. It is immaterial that in the instant case the evidence was the testimony of witnesses, rather than affidavits.

The order of the court in this case is sustained by the decision in *Clark v. Clark,* and is

Affirmed.

G. H. BLACK v. TOWN OF BESSEMER CITY.

(Filed 8 May, 1929.)

Municipal Corporations E d—Where jury finds that plaintiff sustained no substantial damages from sewage disposal plant city not liable for nominal damages—Eminent Domain.

Plaintiff is not entitled to nominal damages in an action against a city for the constructive taking of property by depreciating its value by its sewage disposal plant when the city has the right of eminent domain and the jury has found that no actual damage was sustained.

CIVIL ACTION, before *Harding, J.,* at September Term, 1928, of GASTON.

The plaintiff instituted an action against the defendant to recover damages for injury to his land by reason of the erection and operation of a sewage disposal plant.

Evidence was offered in behalf of the plaintiff that the plant produced noxious odors and gases which vitiated the air and thus depreciated the value of his property, and that in addition, the stream flowing through his land was polluted by the effluent from the disposal plant and by water diverted from Long Creek into pipes, septic tanks and reservoirs, and discharged into a stream flowing through the land of the plaintiff.

Several issues were submitted to the jury. The first issue related to the ownership of the land, which was answered by consent.

The second issue was as follows: "Did the defendant divert the water from Long Creek through its tanks and water system into Crowder's Creek and thereby pollute the waters running through and over plaintiff's lands and damage plaintiff's land, as alleged?"

The jury answered this issue, "No," and returned its verdict. Judgment was entered in favor of the defendant and the plaintiff appealed.

Henry L. Kiser and George W. Wilson for plaintiff.
S. J. Durham for defendant.

PER CURIAM. The plaintiff insisted that his property had been damaged not only by the increase of the volume of water resulting from the diversion of water from Long Creek by the city, but also by reason of noxious odors and gases which invaded the atmosphere so that pollution of both water and air resulted in serious injury to his proprietary rights. Consequently, the plaintiff insisted that the pollution of the stream and of the air amounted in law to a taking of his property, and, therefore, the trial judge should have instructed the jury to award nominal damages at least. This position would be sound except for the provision of C. S., 2805, which expressly confers upon municipalities the right to "construct, establish, maintain and operate" sewerage systems, and in order to make such power effective the right of eminent domain is conferred. *Hines v. Rocky Mount,* 162 N. C., 409, 78 S. E., 410; *Rhodes v. Durham,* 165 N. C., 679, 81 S. E., 938; *Smith v. Morganton,* 187 N. C., 801, 123 S. E., 88.

The plaintiff further insists that the issue submitted by the trial judge and answered by the jury excluded the element of damages claimed by him, arising from the pollution of the air, by confining his recovery exclusively, to the aspect of diversion of water. It appears, however, from the record that this element of injury was submitted to the jury in these words: "It is proper for you, however, to consider evidence of offensive odors, evidence of the presence of mosquitoes and flies, evidence of pollution of the air made there by offensive odors."

A close scrutiny of the record does not disclose error of law, and the judgment rendered is

Affirmed.

STATE v. ED MOORE.

(Filed 8 May, 1929.)

Criminal Law G d—List of witnesses endorsed on bill of indictment not material evidence and its exclusion not error.

The defendant in a criminal action is not entitled to the introduction in evidence of the list of State's witnesses endorsed on the bill of indictment for the purpose of showing that all of them had not been examined by the grand jury nor called as witnesses at the trial.

APPEAL by defendant from *Stack, J.,* at January Term, 1929, of MECKLENBURG. No error.

This is a criminal action in which defendant was convicted of murder in the second degree.

From judgment that defendant be confined in the State's prison for a term of not less than fifteen, nor more than twenty years, defendant appealed to the Supreme Court.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

J. F. Flowers for defendant.

PER CURIAM. Defendant's contention on his appeal to this Court that he is entitled to a new trial for errors committed on the trial in the Superior Court cannot be sustained.

There was no error in excluding the list of witnesses endorsed on the bill of indictment as evidence. Defendant's purpose in offering this list as evidence, as stated by his counsel, was to show that the grand jury did not examine all the persons whose names were endorsed on the bill of indictment as witnesses for the State, and that the solicitor had not called all these persons as witnesses on the trial. We are unable to see how any inference unfavorable to the State or favorable to the defendant could have been drawn from these facts by the jury. They were wholly irrelevant, and had no probative value as evidence.

There was no error in the charge of the court to the jury. Taken in its entirety the charge was free from error and was in full compliance with the statute. C. S., 564. The judgment is affirmed.

No error.

LULA TAYLOR v. F. L. TAYLOR AND F. W. TAYLOR.

(Filed 15 May, 1929.)

1. **Pleadings D b—Complaint alleging conspiracy to defraud plaintiff out of marital rights and asking alimony not misjoinder.**

   A complaint in proceedings by the wife under the provisions of 3 C. S., 1667, for allowance for subsistence and counsel fees, with allegations that the husband had fraudulently conveyed his lands to his father under a conspiracy to defraud the plaintiff out of her marital rights, and afterwards had grossly abused her and coerced her into accepting a deed of separation is good, and a demurrer thereto for misjoinder of parties and causes of action should be overruled, the various causes for which relief is sought being based on a conspiracy or arising out of the same subject-matter or transaction.

2. **Divorce E b—Validity of separation deed need not be determined before granting alimony, and both causes may be joined in one action.**

   Where in proceedings by the wife to secure her subsistence and reasonable counsel fees under the provisions of 3 C. S., 1667, it is alleged that a separation agreement was procured by fraud, sufficiently pleaded, objection that the validity of the separation contract must be first determined in an independent action is untenable, the statute expressly providing that alimony may be granted "pending the trial and final determination of the issues."

3. **Marriage Promise B a—Where parties are bound by contract to marry neither may give away property without consent of the other.**

Where the parties have been bound by a contract to marry, neither can give away his or her property without the consent of the other, and notice before the marriage does not hinder the party injured from insisting on the invalidity of the gift before marriage.

APPEAL by plaintiff from *Harding, J.*, at Chambers, 2 January, 1929, of MOORE. Reversed.

Civil action to obtain alimony without divorce. Heard on motion.

The allegations of the complaint are to the effect that Lula Taylor lived about a mile from the defendant F. L. Taylor, near the town of Vass, in Moore County. That the defendant F. L. Taylor had seduced the plaintiff under promise of marriage, and afterwards they were married on 14 July, 1928, in Randolph County. That on that date, or prior thereto, F. L. Taylor was the owner of certain lands in Moore and Cumberland counties, described in the complaint with particularity. That since the marriage, defendant F. L. Taylor had repeatedly and almost continuously offered to the plaintiff such indignities to her person as to render the condition of plaintiff's life intolerable and burdensome, which is set forth in detail. That he had abandoned her without providing the necessary means of subsistence according to her condition in life. Then a conspiracy and fraud is charged between F. L. Taylor and his father, F. W. Taylor, with whom F. L. Taylor lived, to defraud her out of her marital rights. The conspiracy and fraud being set forth at some length. F. L. Taylor by a deed purporting to be signed two days before his marriage with plaintiff, conveyed all his real estate to F. W. Taylor for the "consideration of $100.00, and other valuable considerations." That the deed was executed and delivered after the marriage, but if before was a part of the fraud and conspiracy. That F. L. Taylor, after he had been married two weeks, induced plaintiff to consent to go to California with him. F. W. Taylor, his father, a railroad employee, procured free passes for himself and wife, and F. L. Taylor used these passes. Before leaving North Carolina, F. L. Taylor had an attorney prepare a separation agreement, relinquishing plaintiff's marital rights for $1,000. This she refused to sign. That in carrying out the fraud and conspiracy he did not go to California, but stopped at Reno, Nevada. She was with child and pregnant for about four and a half months. She was penniless and he threatened to leave her in a strange city, far away from home. That he employed a lawyer at Reno and compelled plaintiff, by undue influence, coercion and duress, to sign a paper-writing which he signed, and had put in it the following: "Whereas, the said F. L. Taylor has wilfully heaped upon the said Lula Taylor such indignities as to render her condition intolerable and life burdensome." The deed of separation sets forth payment of $1,000 to be made in certain installments. The complaint alleges "After the defendant F. L. Taylor paid to the plaintiff $75.00 aforesaid and after the plaintiff had signed said purported deed of separation, the defendant, F. L. Taylor, nevertheless remained with the plaintiff for one night and two days, slept with the plaintiff during said night and compelled her to have sexual intercourse with him during said night." That the payment he made in Reno was taken by plaintiff for necessary subsistence.

The allegations of fraud, undue influence, conspiracy, coercion and duress, in their most harrowing details, are set forth—unnecessary to further repeat.

The plaintiff's prayers for relief:

1. That the purported deed of separation set forth in the complaint be set aside and declared void.

2. That the purported deed from the defendant F. L. Taylor to the defendant F. W. Taylor, set forth in the complaint, be set aside and declared void.

3. That a reasonable sum be fixed and adjudged by the court for the support and maintenance of the plaintiff and for the expenses of counsel in this cause, and that the defendant, F. L. Taylor, be adjudged and decreed to pay such fixed sum from time to time to the plaintiff for her support and maintenance as the wife of the defendant, F. L. Taylor, and to that end that the lands and property of the defendant, F. L. Taylor, described and referred to in the complaint be condemned and sold under the course and practice of the court and the proceeds paid to the plaintiff as her reasonable maintenance and support due to her from the defendant, F. L. Taylor, as his wife.

4. For all such other and further relief as the plaintiff may be entitled to in law or equity under the complaint.

The defendants answer and deny any fraud, undue influence, coercion, conspiracy or duress. Defendants allege that part of the agreement has been paid and they stand ready, able and willing to pay the balance. The defendants demurred *ore tenus.*

The court sustained the demurrer *ore tenus* of the defendants that several causes of action were improperly united in the same complaint, to wit, against F. L. Taylor for alimony under C. S., 1667, with action to set aside a deed of separation executed by plaintiff to defendant, acknowledged in Nevada and probated in North Carolina, and recorded here, with still another action by plaintiff to set aside a deed of conveyance by the defendant, F. L. Taylor to the defendant F. W. Taylor; and the defendant F. L. Taylor further demurs to the motion of the plaintiff for alimony, and resists said motion upon the ground that the court is without jurisdiction to set aside and declare void the deed of separation set up both in the complaint and in the answer, and that so long as said deed of separation is not annulled the plaintiff is not entitled to alimony or counsel fees, and that the statute does not require the husband to pay alimony or counsel fees in an action to set aside a deed of separation alleged to have been executed under duress, or in an action to set aside a deed for property alleged to have been executed in fraud. The court sustained the demurrer and the plaintiff excepted, assigned error and appealed to the Supreme Court.

W. R. Clegg and U. L. Spence for plaintiff.

Hoyle & Hoyle, W. Duncan Matthews and H. F. Seawell & Son for defendants.

CLARKSON, J. The plaintiff's complaint seeks relief as follows: (1) For alimony and counsel fees under C. S., 1667. (2) To set aside a deed of separation between the plaintiff and defendant. (3) To set aside a deed from F. L. Taylor to F. W. Taylor. A conspiracy and scheme growing out of the marriage contract—the one transaction is charged against defendants. All flow from "The same transaction or transaction connected with the same subject of action." C. S., 507(1).

C. S., 1667 (N. C. Code, Anno.), in part, is as follows: "If any husband shall separate himself from his wife and fail to provide her and the children of the marriage with the necessary subsistence according to his means and condition in life, or if he shall be a drunkard or spendthrift, or be guilty of any misconduct or acts that would be or constitute cause for divorce, either absolute or from bed and board, the wife may institute an action in the Superior Court of the county in which the cause of action arose to have a reasonable subsistence and counsel fees allotted and paid for or secured to her from the estate or earnings of her husband. *Pending the trial and final determination of the issues involved in such action, and also after they are determined, if finally determined, in favor of the wife, such wife may make application to the resident judge of the Superior Court, or the judge holding the Superior Courts of the district in which the action is brought, for an allowance for such subsistence and counsel fees,* and it shall be lawful for such judge to cause the husband to secure so much of his estate or to pay so much of his earnings, or both, as may be proper, according to his condition and circumstances, for the benefit of his said wife, and the children of the marriage, having regard also to the separate estate of the wife," etc. (Italics ours.)

Under this section, when a man marries he assumes, and the law imposes on him, certain duties and obligations to the woman. It is contended by defendants that the deed of separation must first be declared invalid. The above statute is to the contrary.

In *Barbee v. Barbee,* 187 N. C., at pp. 538-9, it is said: "Plaintiff takes the position that where the facts of marriage is in issue, as it is here, no order awarding an allowance for a reasonable subsistence and counsel fees under C. S., 1667, as amended by chapter 123, Public Laws 1921, may be made until such issue has been determined by a jury. Such was the holding in *Crews v. Crews,* 175 N. C., 169, decided 6 March, 1918, but the law in this respect has been changed by chapter 24, Public Laws 1919; and it is now provided by statute that the wife may make application for an allowance for a reasonable subsistence and counsel fees 'pending the trial and final determination of the issues involved in such action.'" *Vickers v. Vickers,* 188 N. C., 448; *Price v. Price, ibid.,* 640; *Simmons v. Simmons,* 192 N. C., 825.

On the ground of public policy, deeds of separation are not favored by the law, but under certain circumstances they are recognized by certain statutes, when signed in conformity thereto. C. S., 2515, 2516, 2529. In C. S., 2516, it is written "contracts between husband and wife not forbidden by the preceding section and *not inconsistent with public policy are valid.*"

It seems to be unquestioned that a separation agreement must be untainted by fraud, must be in all respects fair, reasonable and just, and must have been entered into without coercion or the exercise of undue influence, and with full knowledge of all the circumstances, conditions, and rights of the contracting parties. *Hughes v. Leonard,* 66 Colo., 500; 5 A. L. R., Anno. at p. 823. *Smith v. King,* 107 N. C., 273; *Archbell v. Archbell,* 158 N. C., 408.

If the facts alleged are found by the jury not to be true and the deed of separation sustained as valid, no harm can follow, as any subsistence allowed to plaintiff during the pendency of the action, can be credited on the amount agreed to be paid under the deed of separation.

Where the parties have bound themselves by a contract to marry, neither can give away his or her property without the consent of the other; and notice before the marriage of such a gift does not hinder the party injured from insisting on its invalidity. *Poston v. Gillespie,* 58 N. C., 258; *Logan v. Simmons,* 38 N. C., 487; *Spencer v. Spencer,* 56 N. C., 404; *Johnson v. Peterson,* 59 N. C., 12. See *Edwards v. Culberson,* 111 N. C., 342.

In *Trust Co. v. Pierce,* 195 N. C., at p. 718, citing numerous authorities, this observation is made: "A connected story is told and a complete picture is painted of a series of transactions, forming one general scheme, and tending to a single end. This saves the pleading from the challenge of the demurrers." *Scales v. Trust Co.,* 195 N. C., 772.

We think the demurrer *ore tenus* should have been overruled. The judgment below is

Reversed.

CORPORATION COMMISSION OF NORTH CAROLINA v. NATHAN HARRIS.

(Filed 15 May, 1929.)

1. **Banks and Banking H a—Books of bank raises prima facie presumption, subject to rebuttal, that those appearing thereon are stockholders.**

   Entry on the books of a bank of the issuance of stock to the defendant sought to be held for his statutory liability is only prima facie evidence that the defendant is such owner, which may be rebutted by his evidence, and a verdict directed against him upon conflicting evidence is reversible error. 3 C. S., 219(a).

2. **Same—Evidence that defendant was not owner of bank stock held sufficient to be submitted to jury.**

   In an action against an alleged stockholder in a bank to recover his statutory liability, 3 C. S., 219(a), evidence tending to show that he had not subscribed for the stock, had received no dividends nor acted as such owner is sufficient to take the case to the jury in rebuttal of the prima facie case raised by his appearing on the books of the bank as a subscriber to its stock, and alone furnishes no evidence of ratification or estoppel.

3. **Same—Owner of bank stock is relieved of statutory liability thereon only by transfer of shares on books of the bank.**

   A subscriber to the shares of stock of a bank is not relieved of his statutory liability thereon by selling the stock unless the transfer is made on the books of the bank in accordance with the statute. 3 C. S., 219(d).

APPEAL by defendant from *Webb, J.,* at May Term, 1928, of ROWAN. New trial.

The plaintiff alleged that as an administrative department of the State of North Carolina, created and organized as provided by law, it took charge of the business, property, and effects of the Peoples Bank of East Spencer on 30 July, 1926; and that the bank was insolvent. Thereafter the Atlantic Bank & Trust Company was appointed receiver of the Peoples Bank of East Spencer. The receiver filed a petition alleging that the defendant was a stockholder, and demanded payment of his statutory liability as provided in C. S., 219(a). It was admitted for the purpose of the trial that the assets of the Peoples Bank of East

Spencer were insufficient to discharge its obligations and that it was necessary to assess the shares of stock issued by the bank to the full amount of 100 per cent. The defendant denied liability and the following issue was submitted to the jury and answered in the affirmative: "Was the defendant Nathan Harris a stockholder in the Peoples Bank of East Spencer as alleged in the complaint?" Judgment was rendered in behalf of the plaintiff and the defendant excepted and appealed.

P. S. Carlton for the receiver.

J. Harold McKeithen, Walter H. Woodson and Parrish & Deal for defendant.

ADAMS, J. His Honor instructed the jury to answer the issue in the affirmative if they believed all the evidence. In this instruction we think there was error. The stock appeared on the books of the bank as having been issued to and in the name of the defendant but this entry, while prima facie evidence of the defendant's ownership, is not conclusive; the burden of the issue remained with the plaintiff throughout the trial to satisfy the jury by the greater weight of the evidence that the defendant Harris was a stockholder in the bank, as alleged. *White v. Hines,* 182 N. C., 276; *Austin v. R. R.,* 187 N. C., 7. There was evidence in rebuttal of the presumption arising from the entry of the stock in the name of the defendant on the books of the bank. To constitute the defendant a stockholder it was necessary to show, not only that the stock had been issued, but that it had been actually or constructively accepted by the defendant. The defendant denied that he had accepted the stock.

There was evidence tending to show that on 5 January, 1921, the Peoples Bank of East Spencer issued two shares of stock to R. H. Terry and that on 4 April, 1924, Terry's certificate was surrendered to the bank endorsed by Terry to the defendant; that certificates Nos. 103 and 104 were then issued in the name of the latter. The defendant testified that he had never bought any stock in the Peoples Bank of East Spencer, had never authorized any person to buy it for him, and had never paid for such stock. In explanation he said that four or five years before the trial, one F. J. Lassiter came to the defendant's store in Winston-Salem, told him that a letter was coming to Lassiter from East Spencer in the defendant's name, and gave the defendant instructions to deliver the letter to Lassiter without having it opened. It was in evidence that the defendant's wife opened the letter; that Lassiter came to defendant's store on the day following; that the defendant then told Lassiter that he had never authorized him to buy stock in the defendant's name; that he did not want the stock and that he wanted Lassiter to have the entry on the books of the bank canceled. The defendant testified that after the letter was opened he signed these certificates in blank, gave them to Lassiter, and at the same time wrote the bank that he had not subscribed for the stock. He said that he transferred the certificates to Lassiter who had caused them to be sent because he thought Lassiter was the owner, and that he wanted the bank "to take the certificates out of his name." The defendant said, also, that he had never received any dividends and had never heard anything further in reference to the stock until after the appointment of the receiver.

This evidence had a direct bearing upon the questions whether the defendant had bought the stock, whether it had been sent to him without his knowledge, and whether he had refused to accept it. If he neither bought nor subscribed for the stock nor accepted it when it was sent to him, it can hardly be said that he is a stockholder subject to liability for assessment. Under these circumstances, nothing else appearing, there would be neither ratification nor estoppel which would bar the defense.

We do not say there is no evidence that the defendant accepted the stock, but merely that there is evidence to the contrary. In *Trust Co. v. Jenkins,* 193 N. C., 761, it was shown that one of the appellants admitted that he had been a stockholder in the bank and had sold his stock without having it transferred on the books of the bank. The Court said: "He was not relieved of his statutory liability as such stockholder by the sale of such stock. He remained subject to such liability so long as such shares of stock stood in his name upon the books of the bank. He could be relieved of such liability only by a transfer of such shares to a purchaser, in accordance with the provisions of the statutes. 3 C. S., 219(d)." This statement of the law will apply in the present case if the defendant's acceptance of the stock is established.

New trial.

L. H. EARNHARDT AND WIFE, BEULAH LYERLY EARNHARDT, v. FRANK R. BROWN AND STAHLE LINN, TRUSTEES, AND D. A. RENDLEMAN, TRUSTEE IN BANKRUPTCY OF PERPETUAL BUILDING & LOAN ASSOCIATION.

(Filed 15 May, 1929.)

1. **Building and Loan Associations D a—Borrowing stockholder not entitled to have debt credited with amount paid in on stock.**

Equality among the stockholders of an insolvent building and loan association requires that the solvent credits of the association be collected, thus placing the borrowing and nonborrowing stockholders on a parity, second, that the debts be paid, and third that the balance be distributed according to the respective rights of the parties, and the borrowing stockholders are not entitled to first deduct from their debt to the corporation the amounts they have respectively paid on their shares of stock from the amount they are obligated for on the mortgage debt.

2. **Same—Joinder of Trustee in bankruptcy not prejudicial to stockholder suing in State court to enjoin foreclosure by receivers—Parties.**

Where a borrowing stockholder in a building and loan association has filed his proof of claim in bankruptcy proceedings of the association in the Federal court and brings suit in the State court to enjoin the foreclosure of the mortgage securing the loan, he may not successfully maintain that the trustee in bankruptcy, appointed in proceedings regular upon their face, made a party by order of the State court, was not a necessary party therein, nor are his rights prejudiced thereby.

APPEAL by plaintiffs from *Harding, J.*, at February Term, 1929, of ROWAN.

Civil action by plaintiffs, subscribers to stock in the bankrupt Perpetual Building & Loan Association and borrowers therefrom, to restrain foreclosure of their deed of trust and to cancel the indebtedness secured thereby, after deducting the payments made on their stock from the amount borrowed. The trustee in bankruptcy, by order of court, came in and made himself a party defendant and resisted plaintiffs' demand.

From a judgment authorizing a foreclosure of the deed of trust, and denying plaintiffs the relief sought, they appeal, assigning errors.

H. L. Taylor and Joe W. Ervin for plaintiffs.

Rendleman & Rendleman, T. C. Furr and John M. Robinson for defendants.

STACY, C. J. Equality among the stockholders of an insolvent building and loan association requires, first, that the solvent credits of the association be collected (thus placing the borrowing and nonborrowing stockholders on a parity), second, that its debts be paid, and, third, that the balance be distributed according to the respective rights of the parties. *Rendleman v. Stoessel,* 195 N. C., 640, 143 S. E., 219. This is what the defendants are trying to accord the plaintiffs in the present suit. It is all they are entitled to receive.

But failing in their effort to have the payments made on their stock deducted from the amount borrowed, which would credit them with all they have paid on their stock at the expense of the other stockholders, the plaintiffs take the position that the Perpetual Building & Loan Association is not amenable to the Federal Bankruptcy Act, and that the trustee in bankruptcy is not a proper party to this action.

The proceeding in bankruptcy, which has been pending for more than two years, and in which plaintiffs filed claim for the amount paid on their stock, is not void on its face. The allegations of the petition are sufficient to give the Federal Court jurisdiction, and it has decided the question against plaintiffs' contention. *First Nat. Bank v. Klugg,* 186 U. S., 202. This distinguishes the instant case from *Vallely v. Northern Fire & Marine Ins. Co.,* 254 U. S., 248, strongly relied on by plaintiffs. The same point was raised and resolved against the position of the plaintiffs in *Rendleman v. Stoessel, supra.*

Furthermore, it could avail the plaintiffs nothing to have this question decided in their favor. What boots it to them whether they pay their note to the trustee in bankruptcy or to receivers appointed by the State court? They must pay it to somebody. Up to the present, they have been accorded the same consideration as the other borrowing stockholders. They have no right to demand more. It is not contended that they have received less. The plaintiffs have no just cause for complaint.

The verdict and judgment will be upheld.

No error.

JOSEPH KJELLANDER v. PIEDMONT BAKING CO.

(Filed 15 May, 1929.)

Trial E d—Request for instructions not supported by evidence properly refused.

In an action to recover damages for injury alleged to have been negligently caused by a collision between plaintiff's car and the defendant's truck on a public highway, an instruction requested by the defendant is properly refused when not based upon evidence in the case but on an inference that had the plaintiff blown his horn it would have aroused the defendant's driver of the truck from his inattention in time to have avoided the injury in suit.

APPEAL by defendants from *Lyon, Emergency Judge,* at September-October Term, 1928, of BURKE.

Civil action to recover damages for an alleged negligent injury resulting from a collision between plaintiff's automobile, driven by himself, and the defendant's truck operated at the time by one of its servants or employees.

The evidence tends to show that on 9 March, 1928, the plaintiff, while driving in his automobile along highway No. 67, between Taylorsville and North Wilkesboro, saw the defendant's truck approaching from the opposite direction, astride of the center of the hard surface (which was 18 feet wide), running at a speed of about 30 miles an hour and with its front wheels "wobbling." Realizing that something was wrong with the truck, the plaintiff ran his car entirely off the hard surface, on his right-hand side of the road, and stopped. The driver of the truck, instead of keeping with the curve of the highway, ran off the hard surface, on his left-hand side of the road, at a sharp angle and struck plaintiff's car, demolished it, and seriously injured the plaintiff. The collision occurred with the defendant's truck on the wrong side of the highway and plaintiff's car on the right side of the road entirely off the hard surface. Plaintiff ran as far to the right as he could in order to avoid a collision. He did not sound his horn.

The defendant offered no evidence, but proffered the following special instruction:

"If you find from the evidence that the plaintiff knew, or by keeping a proper lookout would have known, that the driver of defendant's truck was not aware of the approach of plaintiff's car, that when plaintiff knew—or should have known such fact—he had time to warn the defendant's driver of his presence by blowing his horn or by making other timely signal, and that plaintiff failed to so blow his horn or to make other timely signal, then the court charges you it would be your duty to answer the second issue 'Yes'; provided you further find from the evidence, and by its greater weight, that the defendant's driver, upon giving such signal, would have turned the truck to the right and thereby avoided the collision and the injury to plaintiff." Prayer refused; defendant excepted.

The usual issues of negligence, contributory negligence and damages were submitted to the jury, and from a verdict and judgment in favor of plaintiff, the defendant appeals, assigning errors.

W. C. Ervin, S. J. Ervin and S. J. Ervin, Jr., for plaintiff.
Self, Bagby & Patrick for defendant.

STACY, C. J. The learned counsel for appellant, Mr. Self, advances the following argument in favor of the special instruction proffered by the defendant, but which the court declined to give:

"It may be that the driver of defendant's truck yielded for a few seconds to a demand for sleep; he may have allowed his mind to wander from the business in hand to contemplation of some real or fancied trouble; he may have fallen into a 'brown study' or a fit of absent-mindedness. But whatever the reason for his lapse, it is highly probable that he would have 'snapped out of it' instantly if the plaintiff had sounded his horn, and there would have been no collision."

The argument is ingenious, and worthy of preservation, but it would seem that the instruction was properly declined, as the defendant offered no evidence to support its contention. The cross-examination of plaintiff did not supply the defect in this respect. The court committed no error in refusing the instruction as requested. The case was fully covered in the charge.

A careful perusal of the record discloses no reversible error committed on the trial, hence the verdict and judgment will be upheld.

No error.

COMMERCIAL INVESTMENT TRUST, INC., v. J. S. WINDSOR, AND JOHN P. BISHOP, JOHN F. FULTON, AND REX F. BISHOP, COPARTNERS TRADING AS "THE MOTOR COMPANY."

(Filed 15 May, 1929.)

1. **Bills and Notes I c—Rights and liabilities of parties upon certification of check.**

   A drawer of a check by having the drawee bank certify it before delivering it to the payee of the check does not change the status of his liability thereon, the effect being to add the credit of the bank to that of his own; but it is otherwise if the payee of the check accepts it uncertified and then has it certified by the drawee bank instead of presenting it for payment, for then the credit of the bank is substituted for that of the drawer of the check and the liability of the latter on the check he has issued ceases. C. S., 3115.

2. **Same—Conflicting evidence as to whether certification was made by drawer or payee should be submitted to jury.**

   Where the evidence is conflicting as to whether the drawer of a check has it certified at the drawee bank or whether this was done by the payee thereof or his agent, a peremptory instruction that the drawer of the check was relieved from liability is reversible error, the issue being for the determination of the jury under proper instructions.

3. **Payment A b—Where check given for prior installment is returned unpaid without knowledge of agent receiving check certified by drawer for full balance, drawer not relieved of liability.**

   Where the defendant purchased an automobile through a local dealer under a title retaining contract securing notes for monthly payments and was sued thereon by the financing corporation claiming as a holder in due course for value, and the defense of payment was pleaded with evidence tending to show that the defendant made payment by certified check given by his agent to the agent of the plaintiff for the full balance due by the defendant, and that the check was rejected by the plaintiff on account of a check given for a prior installment having been returned unpaid, and the rejected check was returned to the defendant's agent and credited to his account, and the evidence as to whether the check was certified by the drawer or the payee was conflicting: *Held*, a peremptory instruction that the drawer of the check would be relieved of liability in the absence of a new contract or understanding was reversible error to the plaintiff's prejudice.

APPEAL by plaintiff from *Clement, J.*, at January Term, 1929, of GUILFORD. New trial.

Action to recover an amount alleged to be due on a note and to subject personal property to the payment of the amount due. The defendant Windsor purchased from his codefendant, The Motor Company, an Oakland automobile, and as evidence of and to secure the purchase price executed and delivered to The Motor Company the following promissory note:

"$876.00 Greensboro, N. C., 8/14/24.

After date, I, we, or either of us, promise to pay to The Motor Company or order, in twelve equal monthly installments of $73.00 each, the first payable one month after date, eight hundred seventy-six and 00/100 dollars with interest from maturity at the highest lawful rate.

And if allowed by law, 15 per cent of the principal and interest of this note as attorney's fees, if placed in the hands of an attorney for collection, and authority is given, irrevocably to any attorney at law to appear for me in any court, and waive the issue and service of process and confess a judgment against me in favor of the holder hereof, for such amount as may appear to be unpaid hereon after maturity, together with costs and attorney's fees, and to release all errors and waive all right to appear. Value received without relief under any exemption or insolvency law. Upon nonpayment of any installments at its maturity all remaining installments shall become immediately due and payable.

Negotiable and payable at the office of Commercial Investment Trust, Incorporated, 41 East Forty-second Street, New York City, with exchange on New York.

(Signed) J. S. WINDSOR."

Contemporaneously with the execution of the note, Windsor and The Motor Company signed a conditional sales contract, by the terms of which Windsor purchased and The Motor Company sold the automobile, the seller retaining title until all the terms of the note and the contract were complied with. Immediately after the execution of these papers they were endorsed and assigned to the plaintiff, who claims to be a holder in due course. On the date they were transferred The Motor

Company guaranteed the payment of the note, waived demand, protest, and notice of protest for nonpayment. In a separate written instrument dated 11 September, 1923, The Motor Company had guaranteed the prompt and faithful discharge of all its present and future liabilities and obligations to the plaintiff growing out of the purchase of its notes—the agreement being continuous and applying to transactions taking place between The Motor Company and the plaintiff after the execution of the paper.

The plaintiff caused the car purchased by Windsor to be seized under proceedings in claim and delivery and it was sold by the sheriff at public auction at the price of $460. The defendants contended that the full amount due on the note in question was paid to the plaintiff prior to the institution of the action. Issues were submitted to the jury and answered as follows:

Is the plaintiff the owner and entitled to the possession of the automobile as alleged in the complaint? Answer: No.

What was the market value of said automobile at the time it was taken by order of claim and delivery? Answer: $700 (and interest from 12 May, 1925).

In what amount, if any, are defendants indebted to plaintiff? Answer: None as to J. S. Windsor. $438 (and interest from 10 April, 1925) by John P. Bishop, John F. Fulton, Rex F. Bishop, trading as The Motor Company.

It was adjudged upon the verdict that the defendant Windsor recover of the plaintiff and the U. S. Fidelity and Guaranty Company as surety upon his bond the penal sum of $1,000 to be discharged upon payment to the defendant Windsor of the sum of $700 with interest as therein provided and that the plaintiff recover of The Motor Company $438 with interest from 19 October, 1925, and the cost of the action. Plaintiff excepted and appealed upon error assigned.

Shuping & Hampton for plaintiff.
Harry R. Stanley for defendants, Rex. F. Bishop and John F. Fulton.
Frazier & Frazier for J. S. Windsor.

ADAMS, J. The defendant Windsor bought an Oakland automobile from his codefendants, The Motor Company, and to secure a part of the purchase price executed the note in controversy and the conditional sales contract. Immediately after they were signed these papers were duly endorsed and transferred to the plaintiff. The note, which was payable in twelve monthly installments, contained a provision that upon nonpayment of any installment at its maturity all remaining installments should then become due. The plaintiff alleged that Windsor had made default in the payment of four successive installments and by letting one of his checks be protested had incurred an additional liability of one dollar and fifty cents. In virtue of the maturing clause the plaintiff brought suit to recover $512.50 with interest, the whole amount claimed to be unpaid. The only answer filed was that of Windsor, who alleged that the note sued on had been fully paid and satisfied before the summons was issued. The plea of payment was controverted, and as to this defense the evidence tended to show the following circumstances: In the latter part of March, 1925, J. W. Holman, who was in the service of the plaintiff, in consequence of a demand made on John P. Bishop, for payment of the note held by the plaintiff, received from Bishop a check in the sum of $438, which the plaintiff refused to accept. Holman made a second demand for payment on 10 April, 1925. Windsor then paid Bishop $438 and Bishop gave to Holman a check which with the endorsement is as follows:

"GREENSBORO NATIONAL BRANCH
AMERICAN EXCHANGE NATIONAL BANK, GREENSBORO, N. C.

10 April, 1925.

Pay to the order of Commercial Investment Trust, Inc., $438.00—not over four hundred thirty-eight dollars and no cents not over.

UNITED MOTOR SALES.
By Jno. P. Bishop.

Acct. No. 227912—14-E

Payment in full note J. S. Windsor, and check previously given on same. . . . And certified as follows:

Certified. Good when properly endorsed. Greensboro National Branch, American Exchange National Bank, Greensboro, N. C. $438.00.

I. F. PEEBLES, *Cashier.*"

And endorsed on back as follows:

"For deposit only pay to the order of any bank, banker, or trust company. COMMERCIAL INVESTMENT TRUST."

The bank charged the check to the account of Bishop, or the United Motor Sales. Holman sent the check to the plaintiff and a clerk in the plaintiff's office stamped the last endorsement on the back of the paper. The plaintiff seeing that the check fell short of the remainder due on the note, sent it back to Holman. Holman turned it over to Bishop, telling him that it could not be accepted in full payment of the note because a check given by Windsor on one of the installments had been returned unpaid, and that to the $438 for which the check was given must be added the unpaid installment ($73 and $1.50, protest fee), making a total unpaid indebtedness of $512.50. The check was returned to the bank by Bishop and was credited on the account of the United Motor Sales; it was never paid to the plaintiff.

There are a number of exceptions to the charge, but in our view of the case it is necessary to consider only the one which was taken to the following instruction: "But if you find that Holman, the agent of the company, took this check from this defendant Windsor, or that he had Windsor to execute this check to Bishop, and that the check was then taken at the request of Holman to the bank and certified, and that he received that check he would be receiving the check from Windsor, and that after the check was certified, that unless he made a new contract or had a new understanding with Windsor about the matter, then Windsor would be relieved from further liability."

This part of the charge is subject to criticism. There is evidence tending to show that when Holman called on the defendants for a settlement he did not have the note, but, according to the testimony of Windsor, only "a duplicate record of the balance due," and that when Holman received the certified check there was due the plaintiff, in addition to the $438 for which the check was given, an unpaid installment of $73 and protest charges of $1.50, making a total of $512.50. It may plausibly be contended that Windsor at that time had knowledge of his unpaid installment and of the charges for his protested check and that Holman did not. At any rate the certified check was not accepted by the plaintiff because, as insisted, it was insufficient to cancel the note; it was returned by the plaintiff to Bishop whose bank account, or that of the company he represented, was then credited with four hundred and thirty-eight dollars. The plaintiff has never received the proceeds of the certified check. Under these conditions was Windsor necessarily relieved of liability for the want of a new contract or a new understanding between him and the plaintiff or the plaintiff's agent?

As to the certification of the check the evidence is conflicting. Holman testified that he procured the certified check from Bishop; that Bishop had it certified and gave it to him. Windsor said on his cross-examination that he gave the money to Bishop; that Holman wanted a certified check; that Bishop gave him a check and had it certified. He said also that "they (Bishop and Holman) went to the bank and had it certified"; but he did not go with them and did not know what occurred there. In another part of his testimony Windsor said he paid Holman. The cashier did not remember who was with Bishop when the check was certified. In this conflict of testimony it will be observed that the instruction excepted to is based upon these hypotheses: (1) that Holman as agent of the plaintiff received the check from Windsor; *or* (2) that he had Windsor to make the check to Bishop; and (3) that the check was then taken to the bank at the request of Holman and certified, and that "he received it in that manner." The first and second of the hypothetical findings are disjunctive, and there is no evidence to support the second. The language is susceptible of the interpretation that if Windsor deposited $438 with Bishop and the United Motor Sales through the agency of Bishop drew its check for this sum and Bishop had the check certified at the request of Holman and then delivered the check to Holman, Windsor would be released from liability to the plaintiff unless a new contract was made. The jury may have understood this to be the meaning; if so, they may have been misled as to the law. The drawer of a check may have it certified before it is delivered to the payee; he may deliver it without certification and the payee may then have it certified for his own benefit. In the latter case the liability of the drawer is not the same as in the former. The distinction is thus pointed out in 5 R. C. L., 524: "When a check payable to another person than the drawer is presented by the drawer to the bank for certification, the bank knows that it has not been negotiated, and that it is not presented for payment, but that the drawer wishes the obligation of the bank to pay it to the holder when it is negotiated, in addition to his own obligation; but when the payee or holder of a check presents it for certification the bank knows that this is done for the convenience or security of the holder. The holder may demand payment if he choose, and it is only because, instead of payment, the holder desires certification, that the bank certifies the check instead of paying it. In one case the bank certifies the check for the use or convenience of the drawer, and in the other for the use or convenience of the holder. If the drawer delivers the check already certified the relations, duties, and obligations between him and the payee or holder are the same as if such check had not been certified. It is otherwise where the check is delivered without certification, and the holder, instead of presenting it for and receiving payment, presents and procures it to be certified. When the drawer of a check procures its certification before delivering it to the payee, this does not discharge him. He remains the creditor of the bank, and still liable to the holder of the check for the amount thereof. The bank, by certifying the check, becomes liable for the amount thereof, but the drawer may nevertheless be held in case the holder exercises due diligence in presenting the check to the bank for payment and giving notice of the dishonor. The only effect of a certification obtained by the drawer is to give additional currency by adding to his credit the credit of the drawee bank; the bank thereby becomes bound, but beyond that nothing is added to the legal force or effect of the instrument." C. S., 3115.

This statement of the law is sustained in cases which are assembled in the annotation of *Blake v. Hamilton Dime Sav. Bk. Co.*, 128 A. S. R., 684, 696; *First Nat. Bank v. Currie*, 9 L. R. A. (N. S.), 698; *Dille v. White*, 10 L. R. A. (N. S.), 510, 536. The drawer is not discharged when the check is certified by his procurement even if it is certified at the request of the payee. Brannan's Negotiable Instruments Law, 898, sec. 188.

The evidence may be considered as tending to establish the fact that Bishop and the company for whom he acted acquiesced in the return of the check and accepted the amount of it as a credit on the drawer's bank account. The drawer therefore was not released from liability; he cannot accept the benefit and reject the burden. Whether under these circumstances Windsor was discharged depends upon his relation to the drawer. He testified as follows: "I paid the money over to Bishop in the presence of Mr. Holman. I had a bank account with the Atlantic Bank & Trust Company at that time. I might have given my check but I didn't. Mr. Holman asked for a check and he then wanted it certified, so I gave the money to Bishop and he gave him a check and had it certified. Although I was doing business with the Atlantic Bank & Trust Company, and had money there, instead of drawing my check on that bank, I turned the money over to Bishop and asked him to settle the bill, so he did it. I told John F. Bishop to settle the note. There were present, myself, Mr. Holman and Mr. Bishop; all three of us. I paid over to Mr. Bishop $438, and Mr. Bishop then issued the check offered in evidence." His answer to the following question, also, may be considered: "When the check was made out on 10 April, you procured Mr. Bishop to handle the transaction for you, to represent you, and to close the transaction for you instead of closing it with Mr. Holman, who was there present?" He answered, "I told him to go ahead and close it. We were both there together. I could have settled direct with Mr. Holman but I would rather Mr. Bishop would do it for me. He had done it all the way through when it was necessary. I could have taken my money to the bank, deposited it and drawn my own check and delivered it to Holman."

There was evidence that the plaintiff never authorized Bishop or The Motor Company to collect any money from Windsor, and that Bishop's connection with the transaction ceased, except as to his personal liability, when the note and contract were assigned to the plaintiff. It was contended by the plaintiff that Windsor constituted Bishop or The Motor

Company his agent to make payment and to settle the controversy with the plaintiff and that any negotiation between the plaintiff and Bishop or The Motor Company was also the negotiation of Windsor. We cannot agree with the appellees that there is no evidence to sustain this contention. If Windsor saw fit to negotiate a settlement with the plaintiff through the agency of Bishop or The Motor Company instead of communicating directly with the plaintiff the scope of the authority thus conferred should be submitted to and determined by the jury. Other instructions present serious questions which need not be considered.

New trial.

P. P. DULIN, EXECUTOR ET AL., v. WILLIAM DULIN ET AL.

(Filed 15 May, 1929.)

1. **Wills E i—Executor may bring action to construe will.**

An executor of a will may seek the advice of the court in the interpretation of the instrument and the disposition of the testator's estate within the intent and meaning of the language used therein.

2. **Wills D b—Issue of devisavit vel non may be joined in action for construction of will by consent of parties.**

In a suit by the executor to interpret the will of the testator wherein the issue of *devisavit vel non* has been raised, the court, with the consent of all the parties interested may treat the case as having arisen upon the issue ordinarily raised upon the caveat to the will probated in common form, and construe the instrument upon an affirmative finding upon that issue.

3. **Wills D i—Correct form of issue of devisavit vel non is sufficient and presents all issuable matters to the jury.**

The form of an issue submitted to the jury upon the caveat to a will "is the paper-writing and every part thereof offered in evidence the last will and testament of the deceased" is sufficient to present every phase of the case to the jury under proper instructions from the court, and when the writing is sought to be established as a holographic will, it is not error for the court to refuse to submit an issue with further inquiry as to its having been found among the testator's valuable papers, or other evidentiary matters arising in the inquiry under the issue submitted.

4. **Executors and Administrators A d—Word "executor" not necessary to appointment of will imposes executor's duties upon appointee.**

Where a letter written by a deceased person to his brother is proven as the holographic will of the deceased, it is not necessary that the writing specifically make use of the word "executor" if the terms employed in the letter confer the powers of executor upon the person addressed.

5. **Wills C d—It is sufficient if holographic will is found among papers regarded as valuable by testator.**

In order to establish a valid holographic will it is not necessary that the papers among which it is found after the death of the testator be the most valuable of his papers, and it is sufficient if he regarded them as papers of value, and worthy of preservation.

6. **Wills D i—Instruction that "every part" of holographic will must be in testator's handwriting includes signature—Burden of proof.**

An instruction that the caveators must prove that "every part" of the paper-writing be in the handwriting of the deceased includes the signature and is sufficient and correct.

7. **Trial E c—Hypothetical illustrations in charge not prejudicial error.**

Hypothetical illustrations explaining the law arising upon the evidence in a case will not be held for reversible error in the absence of potential prejudice to the complaining party.

8. **Wills E f—Construction of will as to beneficiaries thereunder.**

Where the obvious language of a will manifests the intent of the testator that his nieces and nephews are to take as beneficiaries thereunder, his brothers and sisters are excluded by necessary implication.

9. **Same—Construction of will as to share of beneficiaries.**

Where according to the direction of a will the estate is to be equally divided between the nieces and the two nephews of the testator after deducting a certain amount of money from the shares of the nephews, the amount named is to be deducted from the sum of both their shares, each share burdened with one-half the amount named, before equal distribution of the balance is to be made.

10. **Same—Under facts of this case direction in will for education of beneficiary includes support and maintenance.**

A direction to an executor to educate certain beneficiaries under the will includes the support and maintenance of such beneficiaries, under the facts of this case, and the degree of education to be given them is within the discretion of the executor, and the executor has the authority to deduct within his reasonable discretion a certain amount of money from the corpus of the estate for this purpose before making distribution among other beneficiaries as further directed by the will.

11. **Executors and Administrators E a—Direction that estate be equally divided gives implied power to sell estate for division.**

The power given in a will to an executor to divide the estate among the beneficiaries therein named implies the power to sell and convey both the real and personal property when necessary to effectuate the intent of the testator as gathered from the instrument.

APPEAL by Ann Maxwell and her husband, Emmett Maxwell, and Sarah Maxwell and Frances Maxwell, by their guardian *ad litem,* from *Harding, J.,* at March Term, 1929, of IREDELL. No error.

The following paper-writing purporting to be the last will and testament of C. A. Dulin was probated in common form before the clerk of Superior Court of Iredell County and duly registered in the Record of Wills:

"Bro. P. P. Dulin, 11 August, 1926.

If should die or get kill give Fannie Millsaps $2,000 of my estate educate sister Anns two girls and devide the rest equal except Paul Lentz and Ralph Lentz give them $5,000 less than the others or nothing at all of my nephews and neases. C. A. DULIN."

Thereafter P. P. Dulin duly qualified as executor of C. A. Dulin's estate. Fannie Millsaps died during the life of C. A. Dulin and her legacy lapsed. On 10 January, 1929, the plaintiffs instituted this action in the Superior Court of Iredell seeking the advice of the court as to the proper construction of the will. Pleadings were filed and certain of the defendants raised an issue of *devisavit vel non.* It was then agreed by all parties in open court that the action should be treated as a caveat to the will and as a proceeding to have the will probated in solemn form, and that if the issue should be answered for the propounders the construction of the will should be determined by the court. Evidence was introduced and the defendants tendered this issue:

Did C. A. Dulin write all of paper-writing propounded, with intent that it should be operative as his last will and testament, and was it found after his death among his valuable papers or effects?

The following verdict was returned: "Is the paper-writing and every part thereof offered in evidence as Exhibit A the last will and testament of C. A. Dulin, deceased?" Answer: "Yes."

The appellants excepted to the issue submitted and to the refusal to submit the one they tendered. After adjuding that P. P. Dulin had been duly appointed executor, the trial judge construed the will as follows:

"Upon the prayers by the executor for instructions and an interpretation of said will, it is ordered, adjudged and decreed by the court, as follows: (a) That the extent, manner and degree of education of Frances and Sarah Maxwell (admitted by all parties to be Sister Ann's two girls referred to in the will) is in the sound discretion of the executor and the executor has right to set apart an amount which he deems sufficient for that purpose and divide the rest of the estate among those entitled. (b) In view of the fact that the two girls, Sarah and Frances Maxwell are without any means of support and maintenance, which fact was known to C. A. Dulin at the time he made said will, the education of said girls includes their maintenance and support during the period that they are being educated. (c) That the said girls, Sarah and Frances Maxwell shall share equally with the other nieces and nephews in said estate after receiving their education from said estate. (d) That the shares of Paul Lentz and Ralph Lentz (two of the nephews of C. A. Dulin) are to be charged with $2,500 each before they participate in the estate with the other nieces and nephews but the executor has no right in his discretion to exclude them entirely from participation in his estate. (e) That it is the duty of the executor under the will to sell and dispose of all the estate of C. A. Dulin, both real and personal and after the payment of all debts of the said estate and charges and expenses of the administration of said estate and after setting apart a sum which the executor deems sufficient for the education of Frances and Sarah Maxwell and their support and maintenance during the period that they are being educated, as set forth in the above sections (a) and (b), the executor shall divide the estate equally among the following nieces and nephews of C. A. Dulin, whom the court finds to be all of the nieces and nephews of C. A. Dulin, living at the time of his death, subject, however, to the charge of $2,500 each against the shares of Paul and Ralph Lentz as set forth in section (d) above: William Dulin, Lucile Dulin (children of P. P. Dulin, brother of C. A. Dulin); Frances Maxwell, Sarah Maxwell (children of Mrs. Ann Maxwell, sister of C. A. Dulin; Ralph Lentz, Fred Lentz, Ben Miller Lentz, Wilma Marjorie Lentz, Jerry Junior Lentz, Elizabeth Ellen Lentz and Paul Lentz (children of Mrs. Mary E. Lentz, sister of C. A. Dulin). (f) That under the said will P. P. Dulin, the executor, has power to sell and convey the real estate of C. A. Dulin without securing an order of court through a special proceeding instituted for that purpose.

"It is further ordered, adjudged and decreed that P. P. Dulin, Mrs. Ann Maxwell and Mrs. Mary E. Lentz, the brother and two sisters of C. A. Dulin, deceased, have no share or interest in the estate of C. A. Dulin, under the aforesaid will, but that all of said estate, both real and personal, is bequeathed and devised to the nieces and nephews of C. A. Dulin, hereinbefore named, and subject to terms hereinbefore mentioned."

Judgment was rendered for the plaintiffs and the appellants named above duly excepted and appealed upon error assigned in the record.

Scott & Collier and E. M. Land for plaintiffs.
Buren Jurney for defendant appellees.
P. T. Stiers for defendant appellants.

ADAMS, J. In *Harper v. Harper,* 148 N. C., 453, 458, the Court said this: "We note that this proceeding, brought to term, includes both the issue of *devisavit vel non* and proceedings for the construction of the will. This is certainly unusual, but all the parties are before us, and ask that the whole matter be determined in this action. It is not a question of jurisdiction (which we would be compelled to notice *ex mero motu),* for the clerk is part of the Superior Court. No exception is taken, and the whole matter, under the consent and request of parties, is disposed of." The parties to the present suit agreed to pursue the same course and accordingly did not except to the form of the action. It is not denied that the executor had the right to invoke the equitable jurisdiction of the court for direction as to the discharge of his trust. *Freeman v. Cook,* 41 N. C., 373; *Alsbrook v. Reid,* 89 N. C., 151; *Bank v. Alexander,* 188 N. C., 667; *Trust Co. v. Stevenson,* 196 N. C., 29.

The appellants excepted to the issue submitted and to the judge's refusal to submit to the jury the issue which they tendered. The exception is overruled upon the familiar principle reiterated upon similar facts in *Cornelius v. Brawley,* 109 N. C., 542: "The issue submitted arose on the pleadings, and was such as afforded either party opportunity to present any view of the law arising upon the evidence through the medium of pertinent instructions, and was therefore sufficient *(Humphrey v. Church, ante,* 132; *McAdoo v. R. R.,* 105 N. C., 140; *Denmark v. R. R.,* 107 N. C., 187, *Leach v. Linde,* 108 N. C., 547), and indeed, follows the precedents in such cases. Eaton's Forms, 282. The issues suggested by appellants presented rather evidential than constitutive facts, and were properly rejected. *Grant v. Bell,* 87 N. C., 34; *Patton v. R. R.,* 96 N. C., 455."

The jury were clearly instructed that the burden was upon the plaintiffs, who are the propounders, to satisfy the jury by the greater weight of the evidence that the paper in question is the last will and testament of C. A. Dulin; and this part of the charge was followed by the more specific instruction that it was incumbent upon the plaintiffs to prove that the purported will was found among the valuable papers of the testator, that it was intended by him to be a will disposing of his property, and that every part of it was in his own handwriting—the words "every part" of the paper necessarily including the signature. *Mayo v. Jones,* 78 N. C., 402; *Syme v. Broughton,* 85 N. C., 367; *In re Hedgepeth,* 150 N. C., 245; *In re Ross,* 182 N. C., 477. The "affirmative and direct proof" declared to be necessary in *St. John's Lodge v. Callender,* 26 N. C., 335, may be found in the testimony of the witnesses in the case before us, though in the case just cited *Chief Justice Ruffin* no doubt had reference primarily to the insufficiency of hearsay evidence. The appellants have no just cause of complaint against the charge upon the burden of proof.

There was evidence tending to show that the contested paper was found at C. A. Dulin's home, in a trunk which was kept in his bedroom with his clothing; that the trunk was locked, the key in a bookcase; that in the trunk were deeds, plats, paid checks, personal letters, and photographs. It was testified that other papers of a different character and apparently of less value were found elsewhere in the house. The appellants contended that the asserted will was not found among the maker's valuable papers, and excepted to the instruction given on this question.

The following definition of "valuable papers" was approved in the case of *In re Jenkins,* 157 N. C., 429: " 'Valuable papers' within the meaning of the statute are such papers as are kept and considered worthy of being taken care of by the particular person, having regard to his condition, business, and habits of preserving papers. They do not necessarily mean the most valuable papers of the decedent even, and are not confined to papers having a money value, or to deeds for land, obligations for the payment of money, or certificates of stock. The requirement is only intended as an indication on the part of the writer that it is his intention to preserve and perpetuate the paper as a disposition of his property, and that he regards it as valuable; consequently, the sufficiency of the place of deposit to meet the requirement of the statute will depend largely upon the condition and arrangements of the testator. Pritchard on Wills, sec. 237; *Winstead v. Bowman,* 68 N. C., 170; *Marr v. Marr,* 2 Head., 303; *S. c.,* 5 Sneed, 385; *Allen v. Jeter,* 6 Lea, 672; *Reagan v. Stanly,* 11 Lea, 316."

The substance of this definition was included in the charge. The imaginary cases proposed by the trial judge, to which exception was noted, were nothing more than hypothetical illustrations of this definition, containing so far as we can see no potential prejudice to the position taken by the appellants or to the defenses on which they rely.

The remaining exceptions relate to the interpretation of the will. It was first adjudged that P. P. Dulin is the duly appointed executor. The word "executor" does not appear in the will, but the testator imposed upon P. P. Dulin certain duties which are usually performed only by a person acting in a representative or fiduciary character. An appointment of this kind may be indicated by any words which confer upon a designated person the rights, powers, and duties of an executor. The intent of the testator is shown, the appointee is identified, and to him is committed the disposition of the estate. The testator's language, we think, is sufficiently definite to warrant the conclusion that he intended to appoint his brother the executor of his estate. 23 C. J., 1020, 1021; *Harper v. Harper, supra.*

It does not definitely appear whether the testator had assets to be collected and debts to be paid; but we should hesitate to say that the direction to "divide the rest equal" does not import the power to collect as well as the power to disburse. Without deciding this question we may say that the conferred power to divide the property reasonably imports the power to sell it for distribution. *Foster v. Craige,* 22 N. C., 209; *Vaughan v. Farmer,* 90 N. C., 607; *Council v. Averett,* 95 N. C., 131. The exception to the order directing the executor to sell and dispose of the testator's real and personal property must therefore be overruled.

The brother and the two sisters of the testator were properly excluded. In construing the will we must have regard to the testator's intention, but as was said in *McIver v. McKinney,* 184 N. C., 393, it is not the intention that may have existed in his mind if at variance with the obvious meaning of the words used, but that which is expressed by the language he has employed. The testator's expressed intention was to provide for his nephews and nieces—not to give his estate in equal parts to his next of kin.

We have considered all the exceptions but are unable to concur in the appellants' interpretation of the will. We find

No error.

J. A. SHELTON v. M. S. HODGES ET AL.

(Filed 15 May, 1929.)

Appeal and Error J a—Appeal from denial of judgment on pleadings will be dismissed.

An appeal to the Supreme Court will lie only from final judgment, and an appeal from the denial of a motion for judgment on the pleadings will be dismissed.

APPEAL by plaintiff from *Schenck, J.,* at November Term, 1928, of HENDERSON.

Civil action arising *ex contractu* for certain construction work and to recover on an award.

Defendant filed answer, alleged noncompliance on the part of plaintiff, and asked for judgment by way of counterclaim.

Plaintiff moved for judgment on the pleadings. Overruled; exception and appeal. This is the only assignment of error appearing on the record.

L. B. Prince for plaintiff.
Blythe & Sheppard for defendant.

PER CURIAM. The appeal must be dismissed on authority of *Gilliam v. Jones,* 191 N. C., 621, 132 S. E. 566.

The denial of a motion for judgment on the pleadings is not appealable, as there is no final judgment.

Appeal dismissed.

C. H. NANCE v. J. A. AND J. H. HULIN.

(Filed 15 May, 1929.)

Appeal and Error J d—Burden of showing error is on appellant.

On appeal to the Supreme Court the burden of showing error is on the appellant.

CIVIL ACTION, before *Sinclair, J.,* at April Term, 1928, of MONTGOMERY.

The facts are stated in a former appeal reported in 192 N. C., 665, 135 S. E., 774.

Two issues were submitted to the jury. The issue of indebtedness was answered in favor of defendants, and from judgment upon the verdict plaintiff appealed.

W. A. Cochran for plaintiff.
Brittain, Brittain & Brittain for defendant.

PER CURIAM. The evidence presents an issue of fact and no more. No reversible error is pointed out, and the burden to show such error is upon the appellant.

Affirmed.

R. A. NORMAN v. W. R. PORTER.

(Filed 15 May, 1929.)

1. **Master and Servant D b—Father employing son not liable for independent act of son outside of scope of son's employment.**

Evidence tending to show that the plaintiff was injured by an explosion of a cartridge which the defendant's young son threw in the stove in defendant's store on Saturday when the son was helping his father therein, is insufficient to hold his father liable in damages, and defendant's motion as of nonsuit is properly granted. C. S., 567.

2. **Negligence D b—Acts in aid of person injured are not evidence of admission of negligence and liability therefor.**

Where the evidence is sufficient to sustain an action for a negligent personal injury, the defendant's acts of mercy in taking the plaintiff to a hospital after the injury and paying the bill cannot be imputed as an admission of liability for damages.

APPEAL from *Finley, J.,* at March Term, 1928, of CLEVELAND. Affirmed.

Defendant kept a store and his young son, Bobby, about 14 years of age, who went to school, but on Saturdays was helping his father in his store, threw a cartridge in the stove and it exploded and the shell struck plaintiff in the eye putting it out.

At the close of the plaintiff's evidence, the defendant moved for judgment as in case of nonsuit, C. S., 567. The court below granted defendant's motion. Plaintiff excepted, assigned error and appealed to the Supreme Court.

B. T. Falls for plaintiff.
Ryburn & Hoey for defendant.

PER CURIAM. We cannot hold, under the facts and circumstances of the case, that the mischievous act of the defendant's young son was in the scope of his employment and hold the defendant, his father, liable. It was a deplorable affair, but it was a boyish prank that so often brings disaster—but we cannot hold the father responsible.

The fact that defendant procured a doctor, took plaintiff to a hospital and paid the bill is in no sense an implied admission or circumstance tending to admit liability. It was an act of mercy, a humanitarian act to repair as far as possible his boy's mischievous conduct. *Barber v. R. R.,* 193 N. C., at p. 696. The judgment of the court below is

Affirmed.

GEORGE C. SCOTT v. E. A. GILLIS, TRADING AS E. A. GILLIS & COMPANY.

(Filed 22 May, 1929.)

1. **Injunctions D b—Upon conflicting evidence continuance of temporary injunction is proper.**

Where the evidence upon the return of a preliminary restraining order raises serious questions as to the existence of facts which make for plaintiff's rights, and sufficient to establish them if found in his favor, and damages may not be ascertained in law, the preliminary order will be continued to the final hearing.

2. **Appeal and Error J c—Where findings of fact do not appear of record they are presumed correct.**

Where the record does not show a request by the defendant for a finding of fact by the trial court upon which he continues a temporary injunction to the final hearing, the presumption is that the court found the facts to be as alleged in the complaint, and his order based thereon will be affirmed.

3. **Appeal and Error J a—Supreme Court may find facts in injunctive proceedings.**

In injunctive proceedings the Supreme Court has the power to find the facts and to review the findings of fact by the trial court.

4. **Appeal and Error J d—Burden of showing error is on appellant.**

The burden is on the appellant to assign and show error on appeal to the Supreme Court.

5. **Contracts A f—Contract in restraint of trade not void if reasonable and does not affect rights of public.**

A contract not to engage in a certain business within a reasonable area for a reasonable length of time, and which does not affect the interests of the public is not void as being a contract in restraint of trade, and is valid and enforceable.

6. **Same—In this case held, contract not void as being in restraint of trade.**

A contract between a certified public accountant and his employee providing that the employee was not to solicit or do business as an accountant for any one of the plaintiff's customers for a period of three years after the termination of the employment, is not one in restraint of trade against public policy, and, in a suit by the employer to restrain its breach, a continuance of a restraining order against the employee to the final hearing upon proper facts being made to appear in plaintiff's favor, will be upheld on appeal.

7. **Injunctions B c—Breach of contract not to engage in certain bu[illegible] may be enjoined upon proper facts.**

Where it is made to appear that the plaintiff will be damaged [illegible] breach by his former employee of a contract not to solicit or do business of certified public accountant for the customers of his employer within three years after the termination of the employment, a sufficient consideration is shown for the granting of injunctive relief, and the fact that the work was not unique does not affect the question.

APPEAL by defendant from *Stack, J.*, 8 April, 1929, of MECKLENBURG. Affirmed.

The complaint filed by the plaintiff alleges substantially the following facts: That the plaintiff and the defendant are at the present time both engaged in the business of certified public accountants, that on 2 May, 1927, the plaintiff and the defendant entered into an agreement whereby the plaintiff employed the defendant at a salary of $350.00 per month for the first six months, and then for a salary of $375.00

per month; that the defendant promised to perform such duties as should be assigned to him by the plaintiff and promised that he would not, for a period of three years after he left the employ of the plaintiff, solicit or accept any business involving the work generally done by certified public accountants from any person, firm or corporation for whom the defendant performed services while in the employment of the plaintiff; that pursuant to this agreement the defendant remained in the employment of the plaintiff for approximately nineteen months; that the plaintiff paid the defendant the $350.00 per month during the first six months and $375.00 per month after the first six months; that on 1 January, 1929, the defendant voluntarily left the employment of the plaintiff and has since that time started in the business of a certified public accountant for himself and has in violation of his contract solicited and accepted work from persons, firms and corporations for whom he performed services while in the employment of the plaintiff; that the defendant has informed the plaintiff that he intends to so solicit and accept work from any person, firm or corporation that might wish his services. That the plaintiff has no way of ascertaining the amount of damages the defendant is causing him; that the plaintiff is suffering irreparable injury so that the plaintiff has no adequate remedy except to apply to the court for an injunction restraining the defendant from soliciting or accepting, for a period of three years, business generally done by certified public accountants from anyone for whom he performed services while in the employment of the plaintiff.

The matter was heard below on affidavits and the court rendered the following judgment: "In this cause it is ordered and adjudged, that the restraining order heretofore entered in this action be and the same is continued to the hearing as to parties for whom the defendant performed services on an account while in plaintiff's employment and no further."

The defendant excepted and assigned error to the judgment as signed and appealed to the Supreme Court.

F. G. Pierce, Tillett, Tillett & Kennedy for plaintiff.
E. A. Hilker for defendant.

CLARKSON, J. This is a civil action brought by plaintiff against defendant, for the purpose of securing a restraining order to the hearing, restraining defendant from violating an alleged contract of employment, containing a restrictive clause prohibiting the defendant for a period of three years from soliciting or doing business with any clients of the plaintiff or any person for whom the defendant, during the plaintiff's employment, performed services.

In *Tise v. Whitaker-Harvey Co.*, 144 N. C., at p. 510-11, the following is stated: "It is the rule with us that in actions of this character, the main purpose of which is to obtain a permanent injunction, if the evidence raises serious question as to the existence of facts which make for plaintiff's right, and sufficient to establish it, that a preliminary restraining order will be continued to the hearing." *Cain v. Rouse*, 186 N. C., 175; *Camel City Coach Co., v. Griffin*, 196 N. C., 559; *Realty Co. v. Barnes, ante*, 6. "Ordinarily, the right to injunctive relief to compel the observance of covenants and restraintive clauses, is recognized in this jurisdiction." *Realty Co. v. Barnes, supra.*

The record shows no request by the defendant for the court below to find the facts. As there was evidence to support plaintiff's contention, there is a presumption that the court below found the facts to be as alleged in the complaint. In injunctive proceedings, this Court has the power to find and review the findings of fact by the court below on appeal, but the burden being on appellant to assign and show error. Where there is a serious conflict over the material questions of fact, the preliminary restraining order will be continued to the hearing.

Plaintiff and defendant are certified public accountants. N. C., Code, 1927, Anno., 7024a-7024n, ch. 116.

The main question involved in this controversy: Did the court commit error in continuing to the final hearing the order restraining the defendant from violating his contract by soliciting and accepting accounting work from persons, firms and corporations for whom the defendant performed services while he was in the employment of the plaintiff? We think not.

"In *Mar-Hof Co. v. Rosenbacker*, 176 N. C., 330, it is said that although at common law agreements in restraint of trade were held void as being against public policy, this position has been modified until it has come to be the generally accepted principle that agreements in partial restraint of trade will be upheld when they are 'founded on valuable consideration, are reasonably necessary to protect the interests of the parties in whose favor they are imposed, and do not unduly prejudice the public interest.'" *Hill v. Davenport*, 195 N. C., at p. 272. In *Faust v. Rohr*, 166 N. C., 187, the law as to contracts in restraint of trade is exhaustively discussed.

In *Baumgarten v. Broadway*, 77 N. C., 8, the defendant was enjoined from engaging in photography in Charlotte for ten years. In *Cowan v. Fairbrother*, 118 N. C., 406, the defendant was enjoined from engaging in the newspaper business in the State of North Carolina for a period of ten years. In *King v. Fountain*, 126 N. C., 196, the defendant was restrained from engaging in the livery stable business for a period of three years in the town of Greenville. In *Anders v. Gardner*, 151 N. C., 604, the defendant was restrained from engaging in the livery stable business in Gastonia. In *Morehead Sea Food Co. v. B. C. Way,* 169 N. C., 679, the defendant was enjoined from engaging in the business of a fish dealer for a period of ten years within 100 miles of Morehead City. There are numerous other cases in this State to the same effect.

The cases usually cited are where the parties for a consideration purchased a business and the good will, in which they covenanted not to engage in the business—the time limit and territory being reasonable.

In the present case, it was an employee who agreed with the employer, if he left the employer, for three years thereafter not to solicit or accept business from his former employer's clients. By his employment he knew and became associated intimately with his employer's clientele who ordinarily employed his employer. We see no reason why in good conscience a court of equity would not enjoin him from a breach of his contract. Damages would be hard to measure. It can readily be seen how easily he could take business away from his former employer. Ethical business outside of a court of equity would frown on such conduct. There can be no question that there was consideration to support the promise.

The principle is well settled in 6 R. C. L. (Contracts), sec. 206, p. 805, as follows: "At least where the character of the business and the nature of the employment are such that the employer requires such protection, an agreement by an employee not to engage in business in competition with the employer after the termination of the employment, is valid if it is reasonable under the circumstances. As it is lawful and proper to protect a business about to be acquired, from certain acts by the seller, who is familiar with such business, it is equally lawful and proper to protect an established business from such acts by one who has become familiar therewith. If the restrictions are not otherwise contrary to public policy, they must be held to be valid when they appear to be reasonably necessary for the fair protection of the employer's business or rights, and do not unreasonably restrict the rights of the employee, due regard being had to the subject-matter of the contract, and the circumstances and conditions under which it is to be performed. This rule seems to be especially applicable to agreements by assistants to professional men. Such agreements enable an employer to instruct his assistant without fear of afterwards having a rival. Few professional men would take assistants and intrust them with their business, impart to them their knowledge and skill, bring them in contact with their clients and patients, unless they were assured that the knowledge and skill imparted and the friendships and associations formed would not be used, when the services were ended, to appropriate the very business such assistants were employed to maintain and enlarge."

The defendant contends: "The restrictive covenant herein is ancillary to a contract of employment and raises a question heretofore not passed upon by this Court. If the agreement is to be accepted as the basis for the employment and the basis for the restrictive covenant this is not a case in which the services contracted for are unique, extraordinary, unusual or nonduplicated."

In *Sarco Co. of N. J. v. Gulliver,* 129 Atl., at 402, citing numerous authorities, the Court said: "The next point made by the defendant is that defendant's services are not of a kind requiring unique skill and ability. It would seem that counsel is confusing this case with the class of cases where injunction is sought against the violation of a covenant to perform services. There is nothing in the law as to the enforcement of these negative covenants so far as I am aware which makes unique skill or ability a factor in the case. It is simply a question of reasonable protection to the employer (or vendee of a business) against competition by the covenantor who has received consideration for the covenant." The same Court also said, in the same case, citing numerous authorities: "It is entirely settled that negative covenants of the kind in question, ancillary to contracts of sale or of employment are valid and enforceable, if reasonable in their terms."

In *Grainger v. Craven,* 159 Minn., 296, 199 N. W., 10, in which the Supreme Court of Minnesota enjoined a young surgeon and former employee of the plaintiff from engaging in the practice of medicine and surgery or any of the branches thereof, either directly or indirectly, in the city of Rochester, or within twenty miles thereof, for three years after leaving the plaintiff's employ, it is said: "Courts scrutinize carefully all contracts limiting a man's natural right to follow any trade or profession anywhere he pleases and in any lawful manner. But it is just as important to protect the enjoyment of an establishment in trade or profession, which its possessor has built up by his own honest application to every-day duty and the faithful performance of the tasks which every day imposes upon the ordinary man. What one creates by his own labor is his. Public policy does not intend that another than the producer shall reap the fruits of labor. Rather it gives to him who labors the right by every legitimate means to protect the fruits of his labor and secure the enjoyment of them to himself. Freedom to contract must not be unreasonably abridged. Neither must the right to protect by reasonable restrictions that which a man by industry, skill and good judgment has built up, be denied." The judgment of the court below is

Affirmed.

M. C. BRASWELL, INC., v. CITIZENS NATIONAL BANK OF RALEIGH, N. C.

(Filed 22 May, 1929.)

1. **Bills and Notes I b—Payee of check is liable where drawee bank pays check by its draft on another bank which is not paid.**

   Where the payee of a check deposits it in a bank for collection and does not thereon indicate that the collecting bank is to require payment in money, he authorizes the collecting bank to collect in due course of mail and comes within the provisions of 3 C. S., 220(aa), 220(g) as being a check presented by or through a "postoffice," and the collecting bank is not liable for accepting the check of the drawee bank on another bank, resulting ultimately in nonpayment, and the payee must suffer the loss thereon.

2. **Same—Presentment of check for payment through mail is good.**

   A collecting bank makes a good presentment of a check for payment by forwarding it to the drawee bank in another city by mail. 3 C. S., 220(n).

3. **Customs and Usages B a—One depositing check not bound by custom of drawee bank paying same by its draft on another bank.**

   One depositing a check for collection in a bank is not ordinarily bound by a custom among banks that a collecting bank accepts the draft of the drawee bank on another bank in payment.

APPEAL by plaintiff from *Barnhill, J.,* at February Term, 1928, of NASH. Affirmed.

Action to recover of defendant the sum of $6,760.50, as damages alleged to have been sustained by plaintiff, resulting from the negligence of defendant as its agent for the collection of a check drawn on a bank chartered by this State, and payable to the order of plaintiff.

Defendant received said check endorsed by plaintiff, and forwarded same, by mail, to the drawee bank, and accepted in payment of the proceeds thereof the draft of the drawee bank on another bank, which upon due presentment was not paid. The drawer of the draft has been duly adjudged insolvent.

From judgment dismissing the action at the close of the evidence for plaintiff, as upon nonsuit, plaintiff appealed to the Supreme Court.

Battle & Winslow and James P. Bunn for plaintiff.
Smith & Joyner and O. B. Moss for defendant.

CONNOR, J. On or about 23 December, 1925, O. B. Taylor & Company, engaged in business as cotton buyers, at Whitakers, N. C., purchased of plaintiff, a corporation, engaged in the mercantile business at Battleboro, N. C., a lot of cotton. In payment of the purchase price of said cotton, the said O. B. Taylor & Company, drew their check on the Bank of Whitakers of Whitakers, N. C., for the sum of $6,760.50, payable to the order of plaintiff, and delivered said check to plaintiff. On or about 31 December, 1925, said check, bearing the endorsement of plaintiff, and also the subsequent endorsements of the Planters Bank of Battleboro, and of the defendant, Citizens National Bank of Raleigh, N. C., and marked "Paid," and duly canceled, was delivered by the Bank of Whitakers to the said O. B. Taylor & Company, with a statement showing the status of their account with said bank, as of that date. Said account had been charged with the amount of said check. From the date of said check until it was received and accepted for payment by the Bank of Whitakers, the said O. B. Taylor & Company, had on deposit with said bank, subject to their check, a sum in excess of the amount of said check. The amount of said deposit was reduced by the amount of said check, leaving a balance due thereon to the said O. B. Taylor & Company.

Plaintiff received said check from O. B. Taylor & Company, on 23 December, 1925. On said date, the said check, endorsed by plaintiff, was deposited with the Planters Bank of Battleboro for collection, and credited to the account of plaintiff. The Planters Bank of Battleboro endorsed said check and immediately forwarded same by mail to the defendant, Citizens National Bank of Raleigh, N. C., for collection. The Citizens National Bank received said check on 24 December, 1925, and having first endorsed the same, immediately forwarded said check, by mail, to the Bank of Whitakers for payment. The Bank of Whitakers received said check through the mail and charged same to the account of the drawers, O. B. Taylor & Company. On the date of its receipt of said check, the Bank of Whitakers had in its vaults, available for the payment of said check, currency in excess of the sum of $14,000. The Bank of Whitakers, in accordance with the custom of banks, and in the exercise of its option, by virtue of the statute, remitted for the proceeds of said check by its draft on the National Bank of Commerce of Norfolk, Virginia, payable to the order of defendant, Citizens National Bank of Raleigh, N. C.

On 30 December, 1925, the defendant, Citizens National Bank of Raleigh, N. C., received, through the mail, from the Bank of Whitakers, its draft on the National Bank of Commerce of Norfolk, Va., for an amount which included the amount of the check drawn on said Bank of Whitakers by O. B. Taylor & Company, and payable to the order of plaintiff. This draft was accepted by defendant and forwarded by it to the National Bank of Commerce of Norfolk, Va., by mail, for payment. Upon due presentment of said draft, the National Bank of Commerce refused to pay the same. On Monday, 4 January, 1926, the Bank of Whitakers closed its doors and ceased to do business. It was thereafter duly adjudged insolvent. Plaintiff was promptly notified by defendant of its inability to collect the draft which it had received from the Bank of Whitakers in payment of the proceeds of the check. The Planters Bank of Battleboro has charged the amount of said check to plaintiff's account with said bank, with the result that plaintiff has not received payment in money, of the proceeds of said check.

The evidence offered by plaintiff tends to show the foregoing facts: There was no evidence tending to show the facts to be otherwise, or to show other or additional facts pertinent to the decision of the question presented by plaintiff's appeal from the judgment dismissing the action as upon nonsuit.

This question may be stated as follows: When a bank has received from the owner, for collection, a check drawn on a bank or trust company, chartered by this State, and has forwarded said check, by mail, to the drawee bank for payment, and the drawee bank has accepted said check and charged same to the account of the drawer and thereby paid it, with the result that the drawer is discharged, and has remitted the proceeds of said check to the collecting bank by its draft on another bank, in accordance with the custom of bankers, or in the exercise of its option to pay said check by such draft, rather than in money, and such draft upon due presentment is not paid, because of the insolvency of the remitting bank, duly adjudged subsequent to the date of the draft, and prior to its presentment for payment, is the collecting bank liable for the loss sustained by the owner of the check, because of negligence in failing to require of the drawee bank payment in money, and in accepting its draft on another bank in payment of the proceeds of the check?

In view of the provisions of section 2, chapter 20, Public Laws 1921 (3 C. S., 220aa), we need not now discuss or decide the question presented by this appeal, as to whether the owner of a check, which has been deposited by him with a bank for collection, is bound by the custom which the evidence in this case tends to show prevails among bankers, relative to the means by which the proceeds of a check which has been paid by the drawee bank, are remitted by such bank to the collecting bank. The evidence tends to show the existence of a custom among bankers in accordance with which such remittance is made by means of a draft drawn by the remitting bank, on another bank, and payable to the order of the collecting bank. It cannot be held, however, that the owner of a check who has deposited same with a bank for collection, in the absence of knowledge, actual or presumed, of its existence, is bound by a custom among banks, in accordance with which the collecting bank accepts in payment of a check, which has been deposited with it for collection, the draft of the drawee bank on another bank, payable to its order. In the absence of a special agreement to the contrary, or of a local custom of which the owner of the check has actual knowledge, or of a general custom so all-pervading as to affect all persons who deal with banks, or of a statute, which modifies or repeals the general rule of law that checks are payable only in money, the collecting bank is liable to the owner of the check, for loss sustained by its acceptance of payment otherwise than in money. *Bank v. Malloy*, 264 U. S., 160, 68 L. Ed., 617.

In *Gilmer v. Young,* 122 N. C., 806, 29 S. E., 830, it is said: "A custom, in order to amount to notice to all persons, must, like the common law, be general. A local, or general local custom is not notice to any one, unless there be actual knowledge of it, and it will not be treated as entering into the contract without such knowledge." In *Oil Co. v. Burney,* 174 N. C., 382, 93 S. E., 912, it is said to be "established doctrine that the terms of a contract may be explained and interpreted by a prevailing custom or usage and it is recognized further that such custom may be so general and all-pervading, that the parties may be presumed, in some instances, conclusively presumed, to have made their contract in contemplation of it."

The decision of the question presented by this appeal is determined by the provisions of section 2, chapter 20, Public Laws 1921 (3 C. S., 220aa), which are as follows:

"In order to prevent the accumulation of unnecessary amounts of currency in the vaults of the banks and trust companies chartered by this State, all checks drawn on said banks and trust companies shall, unless specified on the face thereof to the contrary by the maker or makers thereof, be payable in exchange drawn on the reserve deposits of said bank, when any such check is presented by or through any Federal Reserve Bank, postoffice or express company or any respective agent thereof."

The check of O. B. Taylor & Company, on the Bank of Whitakers, payable to the order of plaintiff, upon presentation to said bank for payment otherwise than "by or through any Federal Reserve Bank, postoffice or express company, or any respective agent thereof" was payable in money. In the absence of specification on the face of said check to the contrary by the makers, the said check was payable in exchange, drawn on the reserve deposits of the Bank of Whitakers—that is, by draft on another bank, with which the Bank of Whitakers had a deposit to its credit (3 C. S., 220g), when such check was presented by or through any Federal Reserve Bank, postoffice or express company or any respective agents thereof. The plaintiff as owner of the check exercised its option to have the check presented to the drawee bank by or through the postoffice, for it must be held that both plaintiff and its agent for collection, the Planters Bank of Battleboro, knew when the check was sent to the defendant for collection, that defendant would avail itself of the postoffice as the means by which the check would be presented to the Bank of Whitakers for payment. *Bank v. Bank,* 75 N. C., 534. When so presented, by virtue of the statute, the Bank of Whitakers had the option to pay the check by its draft on another bank. Plaintiff, therefore, must be held to have authorized defendant to accept the draft in payment of the check. Defendant having presented the check for payment, by or through the postoffice, as it was authorized to do, could not by virtue of the provisions of the statute, require payment in money, *Bank v. Barrow,* 189 N. C., 303, 127 S. E., 3. Defendant was, therefore, not negligent in accepting the draft of the drawee bank, and cannot be held liable to plaintiff for any loss which has or may result from such acceptance. Plaintiff and not defendant, is a creditor of the Bank of Whitakers, for the amount of the check drawn upon and paid by said bank, and may file claim for such amount with the receiver of said bank.

The forwarding of the check by defendant to the Bank of Whitakers, by mail, was a good presentment (8 C. J., 561) and was expressly authorized by statute. 3 C. S., 220(n).

It may be noted that under the provisions of C. S., 218(c), as amended by chapter 113, Public Laws 1927, claims against the estate of an insolvent bank for amounts due on collection made and unremitted for, or for which final actual payment has not been made by the bank, are now given preference, in the final distribution of the assets of said bank. See subsection 14, of C. S., 218(c). Michie's North Carolina Code, 1927.

By virtue of the provisions of the statute applicable to this case, when the payee or holder of a check drawn on a bank or trust company chartered by this State, and payable at the option of the drawee bank by its draft on another bank, deposits such check with a bank for collection, with knowledge that the collecting bank will in due course present such check for payment by or through a Federal Reserve Bank, postoffice, or express company or any respective agent thereof, and when the drawee bank accepts such check, and pays the same by charging it to the account of the drawer, who is thereby discharged, and in the exercise of its option remits the proceeds of such check to the collecting bank by its draft on another bank, which upon due presentment is not paid, because of the insolvency of the remitting bank, the payee or holder of the check, and not the collecting bank must bear the loss, if any, resulting from the nonpayment of the draft. Nothing else appearing the collecting bank cannot be held liable to the owner of the check for negligence in accepting payment of the proceeds of the check by the draft of the drawee bank on another bank, and in failing to require that payment shall be made in money. There is no error in the judgment. It is

Affirmed.

HENRY C. BERGER v. S. M. STEVENS, ABNER R. ARNOLD, THE FINANCE COMPANY, FRANK A. BARBER, L. B. JACKSON, R. G. SCRUGGS AND HAYDEN GRINDSTAFF.

(Filed 22 May, 1929.)

1. **Aliens A a—Alien of friendly nation may sue in courts of this State.**

A nonresident alien of a friendly nation may invoke the jurisdiction of the courts of this State to maintain his rights of property in the absence of statutory restrictions.

2. **Usury C a—Usury must be pleaded.**

Usury must be pleaded and the question may not be raised by demurrer.

APPEAL by defendants from *Schenck, J.*, at April Term, 1929, of BUNCOMBE. Affirmed.

The plaintiff in his complaint alleges that he is a citizen and resident of Nice, in the Republic of France. The defendant The Finance Company is a corporation created and doing business under the laws of North Carolina, principal office in Asheville, N. C. The other defendants are citizens and residents of Asheville, N. C.

That on or about 12 October, 1926, at Asheville, the defendants, S. M. Stevens and Abner R. Arnold, made and delivered to the defendant, The Finance Company, their three promissory notes in writing, dated on that day, each for the sum of six thousand and forty-two and 50/100 dollars ($6,042.50), wherein and whereby they promised to pay said amounts to said The Finance Company or its order, at Asheville, on or before one, two and three years, after date, respectively, with interest from date at the rate of six per cent per annum until paid, interest payable semiannually. Balance purchase money on land.

That The Finance Company, before the maturity of said notes, endorsed and delivered said notes to the defendants Frank A. Barber, L. B. Jackson, R. G. Scruggs and Hayden Grindstaff, for value, and thereafter, and prior to the maturity of said notes, said Frank A. Barber, L. B. Jackson, R. G. Scruggs and Hayden Grindstaff endorsed said notes for a valuable consideration and transferred said notes to the plaintiff Henry C. Berger.

That plaintiff is now the owner and holder of said notes, and no part thereof has been paid, except half of the interest that had accrued thereon to 12 April, 1927. The two notes payable 12 October, 1928, 1929, were protested for nonpayment.

Plaintiff prays judgment: "(1) That he have and recover of the defendants the sum of $18,127.50, with interest on said notes at the rate of six per cent compound semiannually from the date of said notes, subject only to a credit of one-half of the interest on said notes that had accumulated prior to 12 April, 1927; (2) that he recover the sum of $6.40 as protest fees; (3) that he recover his costs herein incurred; (4) that he have such other and further relief as to the court shall seem proper and just."

The defendants demur: (1) For that it appears upon the face of the complaint that the plaintiff has no legal capacity to sue in the courts of this State. (2) For that it appears upon the face of the said complaint that there is a defect of parties defendant to this action. (3) For that it appears upon the face of said complaint that several causes of action have been improperly united or joined herein. (4) For that it appears upon the face of said complaint that the plaintiff seeks to collect compound interest upon an unlawful contract which is void in law. (5) For that it appears upon the face of said complaint that the complaint does not state facts sufficient to constitute a cause of action."

The court below rendered the following judgment: "This matter coming on to be heard before Schenck, Judge, upon the demurrer filed by the defendants, and being heard, the demurrer is overruled."

The defendants excepted, assigned error and appealed to the Supreme Court.

Mark W. Brown for plaintiff.
Joseph W. Little and George W. Craig for defendants.

CLARKSON, J. The major contest of defendants is founded on the allegation in the complaint that the plaintiff is a nonresident alien and is living in Nice, in the Republic of France. The question arises: Can a nonresident alien sue in the courts of this State? We think a resident of any friendly nation can sue.

In 1796 the question arose in this jurisdiction and an English subject was allowed to sue. In a *per curiam* opinion, in *Executors of Cruden v. Neale,* 2 N. C., at p. 344, the following observations are made: "All persons in general, as well foreigners as citizens, may come into this court to recover rights withheld, and to obtain satisfaction for injuries done, unless where they are subject to some disability the law imposes. Foreigners are in general entitled to sue, unless a war exists between our country and theirs. . . . It is incompatible with a state of national friendship, and is a cause of war, if the citizens of another country are not allowed to sue for and obtain redress of wrongs in our courts."

The law is stated in 2 C. J. (Aliens), p. 1070, part sec. 37, as follows: "It may be laid down, as a general rule, that aliens, except alien enemies, who are *sui juris,* and not otherwise specially disabled by the law of the place where the suit is brought, may there maintain suits in the proper courts to vindicate their rights and redress their wrongs. This right is not affected by the fact that a similar remedy is not afforded to aliens in the country to which plaintiff belongs. The right of an alien to sue is a matter of comity as distinguished from a matter of right, and, while the courts will not ordinarily deny the right in the absence of positive legislation taking it away, they should not permit the privilege to be exercised so as to work injury to the interests of citizens of the state."

1 R. C. L. (Aliens), p. 824, sec. 35, and part 36: "It seems to have been the rule of the early common law that an alien could not maintain real or mixed actions. The reason given was that the maintenance of real actions was not necessary for the encouragement of commerce as in case of personal actions, and that an alien should not be allowed to bring an action to recover property that he could not hold against the state. But the old common-law rule has long since been changed. If an alien may take and hold real estate against every person, he surely may maintain an action to recover its possession from those who wrongfully withhold it from him. If it is the property of the alien as against everybody but the government, he has the right to the use of it; and if necessary to prosecute for it, surely the right to prosecute is necessarily consequent upon the right to its enjoyment. And such is the law at the present time, unless changed by statute. (Sec. 36) As to personal actions, arising or recognized within the jurisdiction, an alien friend, either resident or nonresident, may maintain suit in the courts without any special statutory authority; such was the rule of the early common law, and such is the rule today." See *Krachanake v. Manufacturing Co.,* 175 N. C., 435.

We have no statute in this State prohibiting aliens from instituting an action in the courts of this State.

"The policy of the United States in all cases of complaint made by foreigners is to extend to them the same means of redress as is enjoyed by our own citizens. . . . In the courts of the United States alien friends are entitled to claim the same protection of their rights as citizens." Moore's International Law Digest, Vol. 4, sec. 536, p. 7. *Van Kempen v. Latham,* 195 N. C., at p. 394.

In *Hinton v. Hinton,* 196 N. C., p. 341, it was held in this jurisdiction that an alien was not qualified to act as a juror for as such he was an integral part of the due administration of the law.

It is a matter of common knowledge that the French, and especially the French Huguenots in America, at the breaking out of the Revolutionary War, to a man, joined the American cause. There were no Tories among them. Some of the best fighters, generals and others, were French or of French descent. France came to our rescue during the Revolution and helped us win our independence. It is a disputed fact, but worth preserving, that Gen. John J. Pershing, head of the American Expeditionary Forces during the World War, stood at LaFayette's tomb and said "LaFayette, we are here." The debt we owed to France was not and should never be forgotten. France has always been and is now a friendly nation. We can see no reason why one of her citizens cannot sue in the courts of this State, although a nonresident.

As to the interest proposition, if usury, it must be pleaded. 27 R. C. L. (Usury), sec. 70. The demurrer cannot be sustained.

The other causes of demurrer cannot be sustained. C. S., 507. *Taylor v. Ins. Co.,* 182 N. C., at p. 122. The judgment below is

Affirmed.

G. W. JUSTICE, FRED McBRAYER AND J. FOY JUSTICE, TRUSTEE, v. W. M. SHERARD, R. P. FREEZE AND F. A. BLY.

(Filed 22 May, 1929.)

1. **Pleadings D a—Demurrer will not be sustained if cause of action is sufficiently alleged.**

A demurrer to a pleading on the ground that the complaint does not state a cause of action will not be sustained if its allegations are sufficient to state a good cause, and facts establishing its insufficiency may not be pleaded in the demurrer.

2. **Same—In this case held complaint alleged good cause of action.**

Where the complaint alleges that a partner purchased a certain tract of land for the partnership, but in his own name for the convenience of the partnership, and the deed is taken in the name of the partner and the mortgage and notes for the purchase price are executed by him, a demurrer by the other partners on the ground that a cause of action is not stated by them is bad, since it may be shown that the transaction was a partnership undertaking and that the partnership was liable.

3. **Pleadings D c—Defenses may not be pleaded in demurrer.**

Where the complaint alleges that a written contract in the name of one partner was in fact for the benefit of them all and a partnership act, and so recognized by them all, a demurrer on the grounds that it fell within the meaning of the statute of frauds as being a promise to answer for the debt or default of another, or that the defendants were estopped by the written contract from showing parol matters contrary to its terms, is bad as a "speaking demurrer" and is properly overruled.

4. **Partnership D a—Where one partner executes obligation it may be shown that it was a partnership act.**

Where a partnership executes a contract to purchase a certain tract of land, and the agreement is executed in the name of one of the partners for the firm as a matter of convenience, and the deed made to him upon his execution of a mortgage and notes for the purchase price, it may be shown that the transaction was a partnership act and that the partnership was liable thereon.

APPEAL by defendants, R. P. Freeze and F. A. Bly, from *Schenck, J.*, at Chambers, in Hendersonville, 8 December, 1928. From HENDERSON. Affirmed.

The allegations of the complaint are to the effect that these defendants, together with the other defendant, W. M. Sherard, were conducting a real estate business in Henderson County, under the style of Bly, Freeze & Sherard, and as a part of said business were buying and selling lands; that on 26 September, 1925, the plaintiffs, G. W. Justice and Fred McBrayer, and defendants entered into a contract for the purchase by defendants of the lands described in the complaint that was executed by the defendants in their firm name; that the contract was consummated on 5 January, 1926, the defendants paying the cash payment, and at the request of all of the defendants the deed was executed by the plaintiffs to the defendant, W. M. Sherard, and that on said date the defendant, W. M. Sherard, executed the notes sued on, and also executed a deed of trust to the plaintiff, J. Foy Justice, trustee, on the lands purchased, to secure said notes; that thereafter said partnership made a payment of $150 on the first note due; that the appealing defendants were active in the purchase of said land and that at the time the notes and deed of trust were executed they represented that the land was being bought for the partnership; that the payment of the purchase price was a partnership obligation, but that as a matter of convenience in conveying the property, which the partnership was purchasing, the deeds were being taken in the name of defendant, Sherard, and that the notes and deed of trust were being executed by the defendant, Sherard, only as a matter of convenience; that the partnership was liable for the payment of the purchase price and that the notes and deed of trust were accepted by the plaintiffs, G. W. Justice and Fred McBrayer, with the distinct understanding and agreement that they were the obligation of the partnership and that all of the partners were liable thereon.

The defendants demurred to the allegations of the complaint on the following grounds:

"1. That the execution and delivery of the deed by the plaintiffs, Fred McBrayer and G. W. Justice, to W. M. Sherard, and the acceptance by said plaintiffs of the notes and deed in trust referred to in the complaint executed only by W. M. Sherard constitutes a written agreement between said G. W. Justice and Fred McBrayer and the defendant, W. M. Sherard, separate and apart and in lieu of the original written contract between said plaintiffs and the firm of Bly, Freeze & Sherard; and the said plaintiffs having accepted satisfaction of the original written agreement by conveying the land to E. M. Sherard and receiving his notes and deed in trust as representing the balance of the purchase price, are now estopped as a matter of law and have waived their legal right, if any they have, arising out of the original contract.

"2. That the alleged contract between G. W. Justice, Fred McBrayer and R. P. Freeze and F. A. Bly, was a promise to answer for the debt or default of W. M. Sherard, and was not in writing as required by the statute of frauds."

The court below rendered the following judgment: "This cause coming on to be heard before the undersigned, Michael Schenck, resident judge, and judge holding the courts of the Eighteenth Judicial District, at Chambers, in Hendersonville, North Carolina, on this, 8 December, 1928, upon the demurrer of R. P. Freeze and F. A. Bly, two of the defendants above named, both parties being represented by counsel, and the court being of the opinion that the demurrer should not be sustained: It is therefore ordered, adjudged and decreed, that said demurrer be, and the same is hereby overruled."

The defendants duly excepted, assigned error and appealed to the Supreme Court.

Shipman & Arledge for plaintiff.

Ray & Redden, Ewbank, Whitmire & Weeks for defendants.

CLARKSON, J. In *Pittsburgh Plate Glass Co. v. Hotel Corporation et al., ante,* at p. 12, the following principle is laid down and now reiterated: "A demurrer goes to the heart of a pleading and challenges the right of the pleader to maintain his position in any view of the matter, admitting, for the purpose, the truth of the allegations of fact contained therein," citing authorities.

In *Brick Co. v. Gentry,* 191 N. C., at p. 642, it is said: "A demurrer can be sustained, and it is only appropriate, when the defect or objection appears on the face of the pleading, as it is not the province of a demurrer to state objections not apparent on the face of the pleading to which it is directed. A 'speaking demurrer,' as styled by the books, is one which invokes the aid of a fact, not appearing on the face of the complaint, in order to sustain itself, and is condemned, both by the common law and the Code system of pleading," citing authorities.

On demurrer we cannot anticipate what the answer will set forth and the law arising on all the facts relevant to the issues; we look only to the language and allegations of the complaint. On the present record a cause of action is alleged.

In *Poole v. Lewis,* 75 N. C., at p. 423, it is said: "If a vendor sells goods to a firm, and chooses to take the obligation of the purchasing parties, and waives his right to hold the firm liable, he may do so. But in such case it is necessary for the firm to prove that the vendor knew that the party was a member of the firm, and elected to give credit to the purchasing parties alone—in other words, to take the less instead of the greater security to which he was entitled." *Thornton v. Lambeth,* 103 N. C., 86; see *Supply Co. v. Windley,* 176 N. C., 18.

20 R. C. L., at p. 941 (Partnership), sec. 161, in part, is as follows: "Where a note or bond of one of the partners is taken for an antecedent partnership debt, it may be considered either as payment and extinguishment of such debt, or only as collateral security, according to the nature of the transaction and circumstances attending it." See 20 R. C. L., p. 859, sec. 66.

The defendants present in their demurrer and brief questions that we do not now consider. The judgment of the court below is

Affirmed.

MRS. ELLIE ALEXANDER SPRINGS v. MARY MATTHEWS DOLL.

(Filed 22 May, 1929.)

1. **Negligence A b—Question of whether doctrine of res ipsa loquitur applies is one of law.**

   The question of whether the doctrine of *res ipsa loquitur* applies to a given state of facts is one of law for the court, and when facts upon which the doctrine applies are established the reasonableness of defendant's explanation is for the jury. The principles upon which this doctrine rests discussed by BROGDEN, J.

2. **Same—Doctrine of res ipsa loquitur does not apply in this case involving injury from skidding automobile.**

   Upon evidence tending to show that the plaintiff as an invited guest was riding in the defendant's car with the defendant driving, and that the latter was forced from the highway by a truck negligently driven thereon, causing her car to skid on the wet road, which resulted in the injury in suit, the doctrine of *res ipsa loquitur* does not apply, and the jury's verdict that the defendant was not guilty of negligence is upheld under the facts of this case.

CIVIL ACTION, before *Harding, J.*, at October Term, 1928, of MECKLENBURG.

On 17 January, 1928, the plaintiff was invited by the defendant to ride in her automobile from Lincolnton to Charlotte. The defendant was driving the car and the plaintiff was seated in the back seat. After proceeding some distance rain began to fall and the road became a little wet. A large moving van was approaching the defendant and was traveling in the middle of the road with the front wheels on the white center line on the pavement and the body of the truck protruding beyond the center of the road.

The defendant testified: "I pulled to the extreme right of the road to avoid hitting the truck, and in doing that my front wheels left the paving and in coming back, trying to straighten myself in the road, my car skidded and I put on my brakes, and my car turned and went up an embankment and turned over."

Plaintiff testified: "We saw a truck coming. She moved over just a little to let the truck pass and after it passed she seemed to have lost control of her car. The car began jumping and pitching and started up an embankment and turned back and then turned over. . . . As to how high the embankment was I might say it was eight feet. I didn't take special notice of that. . . . I was not paying any attention to the speed. I have ridden with Miss Doll several times. . . . I said I had no criticism to make at all as I am no judge of driving."

There was evidence relating to serious injury sustained by the plaintiff.

Issues of negligence, contributory negligence and damages were submitted to the jury, and the first issue as to negligence of the defendant was answered in the negative.

From judgment upon the verdict the plaintiff appealed.

John M. Robinson and Hunter M. Jones for plaintiff.
C. H. Gover for defendant.

BROGDEN, J. Does the principle of *res ipsa loquitur* apply to the skidding of an automobile resulting in injury to a passenger?

The principle of *res ipsa loquitur* has been frequently stated in various decisions of this Court and of other courts, and therefore requires no restatement or elaboration. There are, however, certain well established exceptions or limitations to the application of the rule. The most important of these exceptions or limitations may be classified as follows: (1) The apparatus must be such that in the ordinary instances no injurious operation is to be expected, unless from a careless construction, inspection or user; (2) both inspection and user must have been, at the time of the injury, in the control of the party charged; (3) the injurious occurrences must have happened irrespective of any voluntary action at the time by the party injured. *Stewart v. Carpet Co.,* 138 N. C., 60, 50 S. E., 562.

The principle does not apply: (1) when all the facts causing the accident are known and testified to by the witnesses at the trial, *Baldwin v. Smitherman,* 171 N. C., 772, 88 S. E., 854; *Orr v. Rumbough,* 172 N. C., 754, 90 S. E., 911; *Enloe v. R. R.,* 179 N. C., 83, 101 S. E., 556; (2) where more than one inference can be drawn from the evidence as to the cause of the injury, *Lamb v. Boyles,* 192 N. C., 542, 135 S. E., 464; (3) where the existence of negligent default is not the more reasonable probability, and where the proof of the occurrence, without more, leaves the matter resting only in conjecture, *Dail v. Taylor,* 151 N. C., 284, 66 S. E., 135; (4) where it appears that the accident was due to a cause beyond the control of the defendant, such as the act of God or the wrongful or tortious act of a stranger, *Heffter v. Northern States Power Co.,* 217 N. W., 102, 25 A. L. R., 713, note 2; (5) when the instrumentality causing the injury is not under the exclusive control or management of the defendant, *Saunders v. R. R.,* 185 N. C., 289, 117 S. E., 4; (6) where the injury results from accident as defined and contemplated by law.

In the case at bar it does not appear that there was any defect in the automobile or that it was operated at an excessive rate of speed or in any other negligent or careless manner. Therefore, the mere skidding of the automobile, causing it to run upon the embankment and turn over, is the sole basis of the claim of the plaintiff.

The general rule is stated in Huddy on Automobiles (7 ed.), sec. 373, as follows: "The mere fact of the skidding of a car is not of itself such evidence of negligence as to render the owner liable for an injury in consequence thereof." This proposition of law is amply supported by the authorities cited. Thus in *Linden v. Miller,* 177 N. W., 909, the Court said: "Skidding may occur without fault, and when it does occur it may likewise continue without fault for a considerable space and time. It means partial or complete loss of control of the car under circumstances not really implying negligence. Hence plaintiff's claim that the doctrine of *res ipsa loquitur* applies to the present situation is not well founded. In order to make the doctrine of *res ipsa loquitur* apply, it must be held that skidding itself implies negligence. This it does not do. It is a well known physical fact that cars may skid on greasy or slippery roads without fault either on account of the manner of handling the car or on account of its being there." *Williams v. Holbrook,* 103 N. E., 633, 5 A. L. R., 1240; 12 A. L. R., 688; *Bartlett v. Town Taxi Co.,* 160 N. E., 797.

It cannot be reasonably contended that the loss of control of an automobile by the driver thereof is, under all circumstances, sufficient evidence of negligence to carry the case to the jury. His control is limited by the condition of the pavement and by the negligence and unexpected acts and conduct of other drivers of vehicles. Moreover, all the facts are known and testified to by the witnesses, and all sources of information were as accessible to the plaintiff as to the defendant.

Indeed, some courts have held that the doctrine of *res ipsa loquitur* is to be used sparingly and to be invoked only when the facts and the demands of justice make its application essential. *Heffter v. Northern States Power Co., supra; Riggsby v. Tritton,* 129 S. E., 493.

We do not hold that the principle of *res ipsa loquitur* does not apply to any given state of facts involving injuries flowing from the use of automobiles, but we do hold that the principle is not applicable to the facts disclosed by this record. Upon admitted or proven facts the question as to whether the principle applies is a question of law for the court in the first instance; but, if upon such facts, the principle is applicable, the reasonableness of the explanation made by the defendant is for the jury.

No error.

LEANNA STALEY v. LUZINA LOWE.

(Filed 22 May, 1929.)

1. **Executors and Administrators D a—In this case held evidence of express promise to pay for services rendered deceased insufficient.**

   Evidence that the deceased's mother had told the witness, her son, in plaintiff's absence, that "whoever waited on her should have all that she had" is too vague and indefinite to constitute an express contract to pay her daughter for services rendered, and the daughter may not recover thereon, after her mother's death, against the administratrix.

2. **Same—Child living with mother as family may not recover on implied promise to pay for services rendered deceased.**

   An adult child living with her mother as a part of the family, and rendering services to her cannot after her mother's death recover their value upon a *quantum meruit*, it being assumed that the services were rendered gratuitously in the absence of evidence to the contrary, and the mere rendition of the services is insufficient evidence of an expectation of payment on one hand and the intention to pay on the other, and the mere moving from the old family home to a new home without evidence of a change in the relationship is insufficient to change this result, and defendant's motion as of nonsuit is properly granted.

CIVIL ACTION, before *Townsend, J.*, at March Term, 1928, of RANDOLPH.

The plaintiff is a daughter of Martha Staley, who died intestate on or about 6 February, 1923. The defendant is also a daughter of the deceased.

The deceased lived at the home place after the death of her husband, although it seems no dower had been allotted to her and by common consent she was occupying the entire plantation. About the year 1919 the plaintiff and her sister, who were unmarried and who had previously been living with the deceased, bought a tract of land and moved to their own property and took their mother with them to their new home. The evidence discloses that the mother and two daughters lived together in the same house until the death of the mother. Upon the death of the mother, plaintiff instituted an action against the defendant on 23 April, 1925, to recover for services rendered her mother, Martha Staley. The defendant resisted the action upon the ground that there was no express contract and that the plaintiff could not recover on *quantum meruit* for the reason that the mother and daughters lived together as one family.

Two issues were submitted to the jury, as follows:

"1. What amount, if any, is defendant indebted to plaintiff?

"2. Is plaintiff's cause of action barred by the three-year statute of limitations?"

The jury answered the first issue, "$1,000," and the second issue, by direction of the court, "Yes, except nine months and sixteen days."

From judgment upon the verdict the defendant appealed.

No counsel for plaintiff.
J. A. Spence for defendant.

BROGDEN, J. The plaintiff bases her cause of action upon two theories:

1. That there was an express contract between the plaintiff and the deceased to pay for services rendered.

2. That if there was no express contract, the law implied a promise by the deceased to pay the reasonable worth of the services rendered by the plaintiff and accepted by the deceased.

The only evidence relied upon to establish an express contract was the following statement by a brother of the plaintiff: "Martha Staley said whoever waited on her should have all that she had. I heard her make that statement before and after going to the Smith place." It does not appear from the evidence that the plaintiff was present when these conversations took place, or that they were communicated to her by her brother. Moreover, the statement itself was too vague, uncertain and indefinite to constitute a contract. *Brown v. Williams,* 196 N. C., 247.

Upon the second theory involving *quantum meruit,* the law is thus stated in *Winkler v. Killian,* 141 N. C., 575, 54 S. E., 540: "It is equally well established that when a child resides with a parent as a member of the family or with one who stands to the child in *loco parentis,* services rendered under such circumstances by the child for the parent are, without more, presumed to be gratuitous and no promise will be implied and no recovery can be had without proof of an express and valid promise to pay, or facts from which a valid promise to pay can be reasonably inferred. This last position is usually considered as an exception to the general rule, and in this and most other jurisdictions obtains both as to adult and minor children. Wherever the same has been applied, however, to claims by adult children so far as we can discover, it has been made to depend not alone on the fact of kinship in blood, but also on the fact that the adult child has continued to reside with the parent as a member of the family."

In the case at bar the plaintiff and her mother lived together as one family at the old home place. The plaintiff purchased a new home and the family moved away from the old home to the new home. We see nothing in the evidence to indicate there was any break in the family unity except the mere fact of moving together from one place to another. Furthermore, there is no evidence in the record tending to show that the services were rendered in expectation of payment or that deceased intended to make payment, except perhaps the mere fact of the rendition of services. There is no decision in this jurisdiction where such family relationship exists holding that the mere rendition of services, without more, is sufficient evidence of an expectation of payment on one hand and the intention to pay on the other. *Winkler v. Killian,* 141 N. C., 575, 54 S. E., 540; *Dorsett v. Dorsett,* 183 N. C., 354, 111 S. E., 541; *Ellis v. Cox,* 176 N. C., 616, 97 S. E., 468.

We therefore hold that the motion for nonsuit should have been allowed.

Reversed.

C. J. POOLE v. L. M. RUSSELL, D. T. RUSSELL, A. R. BOATWRIGHT, AND DORIS RUSSELL BOATWRIGHT.

(Filed 22 May, 1929.)

Evidence D a—Evidence as to identification of boundaries by parties held in this case to be inadmissible as a transaction with decedent.

Testimony of a party interested in the result of the action that the deceased predecessor of the common source of title of the parties had agreed as to the boundary of the lands in dispute preliminary to making the deeds, that the deceased had the lands surveyed and that the witness saw the deceased mark the boundary claimed by him as controlling the description given in the deeds later made, is that of a transaction or communication between the witness and a deceased person prohibited by C. S., 1795, and its exclusion on the trial is not error.

APPEAL by defendants from *Oglesby, J.*, at September Term, 1928, of MONTGOMERY. No error.

Action to recover land in which judgment was rendered for the plaintiff upon the following verdict: "Is the plaintiff the owner and entitled to the possession of the land described by the lines B, C, F, E? Answer: Yes."

Brittain, Brittain & Brittain for plaintiff.
R. T. Poole for defendants.

ADAMS, J. The plaintiff brought suit to recover a small strip of land represented on the plat by the letters B, C, F, E. It was admitted that he and the defendants derived whatever title they have from W. B. Beaman as a common source. The two decisive questions were whether the boundaries in the plaintiff's deed include the land in controversy, and if they do, whether the plaintiff's title was barred by the adverse possession of the defendants. Both questions were resolved in favor of the plaintiff and from the judgment awarded the defendants appealed.

We have considered the exceptions and find that only one requires special comment. W. B. Beaman and his wife conveyed a town lot to Mrs. Russell on 13 February, 1904. L. M. Russell, her husband, was introduced as a witness for the defendants and was asked this question: "State if on the survey made 11 February, 1904, you saw the corner established by driving down iron stakes at the corner?"

The defendants proposed to prove that on 11 February, 1904, an actual survey was made of the lot conveyed to Mrs. D. T. Russell, and that iron stakes were driven down at the points E and F on the plat by W. B. Beaman and the surveyor; that corners were established and that the witness saw Beaman drive the stakes down. Upon the plaintiff's objection the proposed evidence was excluded and the defendants excepted.

One of the rules adopted for settling questions relating to the boundary of lands is thus stated in *Cherry v. Slade,* 7 N. C., 82: "Whenever it can be proved that there was a line actually run by the surveyor, was marked and a corner made, the party claiming under the patent or deed shall hold accordingly, notwithstanding a mistaken description of the land in the patent or deed." This statement is somewhat clarified in *Clarke v. Aldridge,* 162 N. C., 326: "It has long been held for law in this State that when parties, with a view of making a deed, go upon land and make a physical survey of the same, giving it a boundary which is actually run and marked, and the deed is thereupon made, intending to convey the land which they have surveyed, such land will pass, certainly as between parties or voluntary claimants who hold in privity, though a different and erroneous description may appear on the face of the deed. This is regarded as an exception to the rule, otherwise universally prevailing, that in case of written deeds the land must pass according to the written description as it appears in the instrument *(Reed v. Schenck,* 13 N. C., 415); but it is an exception so long recognized by us that it must be accepted as an established principle in our law of boundary." See *Watford v. Pierce,* 188 N. C., 430.

In asking the excluded question the appellants sought to apply this rule. The appellee's assigned ground of objection was that by virtue of C. S., 1795, the proposed testimony was inadmissible. This section provides that a party or a person interested in the event of an action shall not be examined as a witness in his own behalf or interest against a person deriving his title or interest from, through, or under a deceased person concerning a personal transaction or communication between the witness and the deceased person except under certain conditions which do not exist in this case. The appellants offered to show that certain corners and lines had been established by Beaman and Russell at the time of the survey in 1904, although the distances called for in the deed to Mrs. Russell did not extend to these intended boundaries. Beaman is dead; from him the plaintiff derived his title. Russell is a party to the action and interested in the event. The proposed testimony was therefore incompetent if it discloses a communication or transaction between Russell and Beaman. Does it reveal a communication or personal transaction or a substantive and independent fact? If it contained nothing more than what the witness saw there might be some reason for regarding it as an independent fact. *McCall v. Wilson,* 101 N. C., 598; *Lane v. Rogers,* 113 N. C., 171. But when the survey was made Beaman and Russell (Russell representing his wife) were engaged in fixing boundary lines as preliminary to the execution of the deed, and the location of the boundaries was as much a part of the contract as the execution of the deed two days afterwards. Testimony that

Beaman set the stakes at certain corners would in effect have been equivalent to testimony that the corners had been established by Beaman's consent at points beyond the calls in the deed. It is in this sense that an attempt to show that corners had been fixed by the parties beyond the distances set forth in the deed would have introduced the element of a communication or personal transaction between Russell and Beaman, making the proposed testimony incompetent. It may be noted that in *Clarke v. Aldridge, supra,* there is a strong intimation that an agreement of this character would not be binding upon purchasers for value without notice. There was no error in excluding the proposed evidence.

The remaining exceptions call for no discussion.

No error.

STATE v. EDGAR BARBEE, ALIAS BUDDIE BARBEE, CHARLES FAIRCLOTH, ORLEY O. SCURLOCK, J. W. GARVIN AND O. S. IVEY.

(Filed 22 May, 1929.)

Receiving Stolen Goods D c—Verdict in this case held fatally defective.

Where the evidence is conflicting as to whether the defendant knew at the time of receiving goods that they were stolen, and the charge of the court fails to instruct that finding of such knowledge was necessary for conviction, the verdict of guilty without finding that the defendant possessed such knowledge at the time he received the goods is defective, and a *venire de novo* will be ordered on appeal.

APPEAL by defendant, E. B. Barbee, from *Sink, Special Judge,* at September Term, 1928, of RANDOLPH.

Criminal prosecution tried upon an indictment charging the defendant, E. B. Barbee, and others, (1) with the larceny of a Chevrolet roadster, valued at $564, the property of Johnson Chevrolet Company, and (2) with receiving said Chevrolet roadster, valued at $565, the property of Johnson Chevrolet Company, knowing it to have been feloniously stolen or taken in violation of C. S., 4250.

Verdict: "Not guilty as to John Garvin. Verdict as to Charlie Faircloth, E. B. Barbee and Odell Scurlock, guilty of having car in their possession knowing it to be stolen." (As shown by return to writ of *certiorari,* but not appearing in original record.)

Judgment: Imprisonment in the State's prison as to each of the defendants convicted for not less than five nor more than ten years at hard labor.

The defendant, E. B. Barbee, alone appeals, assigning errors.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

George A. Younce and Walter E. Brock for defendant, Barbee.

STACY, C. J. The defendants, other than Garvin, admitted that the car in question was found by the officers in their possession, but they denied having received it, knowing at the time that it had been feloniously stolen or taken. C. S., 4250. They offered evidence tending to show that a man by the name of Brooks or Yow came along driving the Chevrolet roadster, picked up the defendants, carried them in the direction of Sanford and on towards Fayetteville, and somewhere near the latter place, the said driver left the automobile, and went off; whereupon the defendants drove the car to the home of the defendant, Garvin, where it was found.

The State contended that Brooks or Yow was but an imaginary person or a mere man of straw, and that the defendants alone were responsible for the larceny of the automobile.

Viewed in the light of the evidence and the charge of the court, the verdict would seem to be defective or insufficient to support a judgment, as it is not responsive to the indictment. *S. v. Shew,* 194 N. C., 690, 140 S. E., 621; *S. v. Whitaker,* 89 N. C., 472. See, also, *S. v. Gregory,* 153 N. C., 646, 69 S. E., 674, and *S. v. Parker,* 152 N. C., 790, 67 S. E., 35. It is not found that the defendants *received* the car in question knowing at the time that the same had been feloniously stolen or taken. *S. v. Dail,* 191 N. C., 231, 131 S. E., 573; *S. v. Caveness,* 78 N. C., 484. Nor was the jury instructed that such a finding would be necessary before the defendants could be convicted on the second count. *S. v. Caveness, supra.*

On the record as it now appears, the appealing defendant is entitled to a *venire de novo;* and it is so ordered.

Venire de novo.

WILLIAMS-FULGHUM LUMBER COMPANY v. I. M. WELCH.

(Filed 22 May, 1929.)

1. **Pleadings E a—Allegations of counterclaim deemed denied when not served on plaintiff.**

Public Laws of 1924, ch. 18, providing that an answer of defendant setting up a counterclaim will be deemed denied unless a copy thereof is served on the plaintiff or his attorney, is not referred to in Public Laws of 1927, ch. 66, and construing the two acts together there is no repugnancy between them so as to repeal by implication the former law on the subject.

2. **Statutes C b—Repeal of statute by implication is not favored.**

   Repeals of statutes by implication or construction are not favored by the courts, and for a later statute to repeal a former one the repugnancy between them must be clear, and then the repeal will operate only to the extent of the repugnancy.

3. **Judgments D a—Judgment by default on counterclaim properly set aside in this case.**

   It is proper for the judge of the Superior Court to set aside a judgment by default on defendant's counterclaim under the provisions of Public Laws of 1924, ch. 18, when the plaintiff, or his attorney, is not served with a copy thereof, since the law denies the allegations of the counterclaim when such service is not made.

APPEAL by defendant from *McElroy, J.*, at December Term, 1928, of BUNCOMBE.

Civil action wherein plaintiff seeks to recover for breach of contract in connection with the sale of a certain quantity of lumber. Summons issued and complaint filed 25 November, 1927. Defendant answered 10 December, 1927, denied liability and set up a counterclaim for $3,600.

The answer of the defendant, containing said counterclaim, was not served upon the plaintiff, and no answer, demurrer, or reply denying the same, was filed by the plaintiff; whereupon, on 26 March, 1928, judgment by default and inquiry was entered against the plaintiff and in favor of the defendant on said counterclaim.

Thereafter, 21 December, 1928, on motion of plaintiff, said judgment by default and inquiry was set aside on the ground that no copy of the answer, containing the counterclaim, was ever served on the plaintiff or its attorney.

From this order, vacating the default judgment, the defendant appeals, assigning error.

Wells, Blackstock & Taylor for plaintiff.

Hoyle & Rudisill, W. A. Sullivan and J. M. Horner, Jr., for defendant.

STACY, C. J. It is provided by chapter 18, Public Laws, Extra Session, 1924, among other things, that "if a counterclaim is pleaded against any of the plaintiffs and no copy of the answer containing such counterclaim shall be served upon the plaintiff or plaintiffs or his or their attorneys of record, such counterclaim shall be deemed to be denied as fully as if the plaintiff or plaintiffs had filed an answer or reply denying the same." Clearly, under this provision of the law, the trial court was correct in setting aside the judgment entered by default and inquiry on the defendant's counterclaim.

But it is contended on behalf of the defendant that chapter 18, Public Laws, Extra Session, 1924, was repealed by chapter 66, Public Laws, 1927, for in the latter act it is provided that "The defendant shall, when he files answer, likewise file at least one copy thereof for the use of the plaintiff, and his attorney; and the clerk shall not receive and file any answer until and unless such copy is filed therewith."

The 1924 act deals exclusively with counterclaims, while no specific reference is made to counterclaims in the 1927 act. Hence it could hardly be said that a repeal was intended by the Legislature or that such has resulted by operation of law. *S. v. Perkins,* 141 N. C., 797, 53 S. E., 735. Repeals by implication are not favored by the law, and it is the policy of the courts to avoid such construction unless the repugnancy between a subsequent act and one of prior date be irreconcilable. *Bunch v. Commissioners,* 159 N. C., 335, 74 S. E., 1048. "Repeals by implication or construction are not favored, and for such a repeal to take effect, the repugnancy between the latter statute and one of earlier date must be clear, and only then will the repeal operate to the extent of such repugnancy." *Waters v. Commissioners,* 186 N. C., 719, 120 S. E., 450. To like effect is the decision in *Litchfield v. Roper,* 192 N. C., 202, 134 S. E., 651.

No such irreconcilable conflict exists between the two statutes now under consideration. Hence, it would appear, from a proper construction of both statutes, that unless a copy of the answer containing a counterclaim, is served on the plaintiff or his attorney, the allegations going to make up the counterclaim are to be considered and dealt with as denied.

It follows, therefore, that the defendant has no just cause for complaint at the action of the trial court in allowing the motion of the plaintiff to strike out the judgment entered by default and inquiry on his counterclaim.

Affirmed.

WHITAKER-HOLTSINGER HARDWARE COMPANY ET AL. v. W. T. WHITTEN ET AL.

(Filed 22 May, 1929.)

Abatement and Revival B a—In this case held, present action barred by prior action between same parties nonsuited upon one phase only.

Where the mortgagee brings action to foreclose on his mortgage on the defendant's stock of goods, and thereafter the plaintiffs bring a creditors' bill to recover on their claims and to set aside the mortgage on the grounds of fraud, and the two actions are consolidated, and upon trial it is adjudged that there was no evidence of fraud in procuring the mortgage, and upon this phase the action is nonsuited, and it is further adjudged that the balance arising from the sale of the stock, after paying the mortgage, be turned over to a receiver, appointed in the action, for the benefit of the creditors: *Held*, a subsequent creditors' bill, seeking the same relief, is barred by the prior action, the plaintiffs having had their day in court, and being still in court in the other action.

APPEAL by plaintiffs from *McElroy, J.*, at October Term, 1928, of MADISON.

Creditors' bill filed by plaintiffs to recover on their claims against W. T. Whitten and to set aside a mortgage on the defendant's stock of merchandise.

The lien in question was a purchase-money mortgage given by Whitten to W. C. Fowler 1 April, 1927, at the time of the purchase of the said stock of merchandise. Default having occurred in the payment of the notes secured by said mortgage, Fowler on 31 December, 1927, instituted suit against Whitten to recover thereon and seized the stock of goods under claim and delivery.

Thereafter, the plaintiffs herein filed a creditors' bill against W. T. Whitten, asked for the appointment of a receiver, joined W. C. Fowler as a party defendant, and assailed the validity of the mortgage held by him, alleging that the same was procured by fraud.

At the May Term, 1928, Madison Superior Court, these two suits, by consent, were consolidated and tried together. As a result of this hearing, it was adjudged that the purchase-money mortgage given by Whitten to Fowler was a valid encumbrance on the stock of goods in question; that the creditors in their suit had offered no evidence of fraud in the procurement of said mortgage, and, to this extent, the same was "nonsuited"; but it was further adjudged, as a result of said hearing, that the balance arising from a sale of the stock of goods, after paying the first encumbrances enumerated therein, should be turned over to the receiver, appointed in said action, for the benefit of the creditors of W. T. Whitten.

This judgment was held to be a bar to the present action, instituted 3 August, 1928, as a second creditors' bill and again attacking the validity of the Fowler mortgage. Plaintiffs appeal, assigning errors.

C. B. Mashburn and Thomas S. Rollins for plaintiffs.

Guy V. Roberts and John H. McElroy for defendants, Fowler and Gudger.

STACY, C. J., after stating the case: It is apparent from the record that the first creditors' bill was "nonsuited" only so far as it assailed the validity of the purchase-money mortgage given by Whitten to Fowler, and this upon the ground that no evidence had been offered to support the allegation of fraud. Hence, the trial court properly held that the judgment entered in the consolidated action tried at the May Term, 1928, Madison Superior Court, was a bar to the present suit. The plaintiffs have had their day in court; they are still in court in the other action; they have no just cause for complaint at the action of the trial court in dismissing the present suit. *Morrison v. Lewis, ante,* 79; *Allen v. Salley,* 179 N. C., 147, 101 S. E., 545.

Affirmed.

C. G. MORRIS, TRADING AS C. G. MORRIS & COMPANY, v. D. W. AND W. A. CLEVE, THE NATIONAL BANK OF NEW BERN, AND H. P. WHITEHURST, RECEIVER OF THE BANK OF VANCEBORO.

(Filed 22 May, 1929.)

1. **Bills and Notes I d—Endorser paying check is subrogated to rights of payee.**

Where a person presenting a note to a bank is required to endorse it, and later to endorse the drawer's check payable to the bank and taken by it in payment of the note, and the check is not paid and is charged by the bank to the endorser's account therein, the endorser so paying the check is subrogated to the rights of the payee bank and becomes the real party in interest and may prosecute an action against the drawer, payee, and collecting banks under the provisions of C. S., 446, to determine the liability of the parties.

2. **Pleadings A c—Where the Supreme Court upholds judgment sustaining a demurrer trial court has discretionary power to allow amendment.**

A demurrer to a complaint will be sustained upon the insufficiency of the complaint to state a cause of action, and where a judgment sustaining such demurrer has been appealed from and upheld by the Supreme Court, the trial court has the power, in the exercise of his sound discretion, to allow the plaintiff to amend the original complaint upon motion made within ten days after receipt by the clerk of the Superior Court of the certificate showing that the judgment of the Superior Court had been affirmed. C. S., 515.

3. **Pleadings D e—Demurrer on ground that cause of action not stated challenges only sufficiency of allegation of complaint.**

A demurrer to the complaint on the grounds that it does not state a cause of action does not deal with the merits of the controversy, but only with the sufficiency of its allegations.

4. **Pleadings D d—Right to demur for misjoinder is waived by failure to plead in apt time.**

Failure to demur to the pleadings upon the ground of misjoinder of parties and causes of action or to take exception thereto on these grounds is a waiver of the right.

5. **Bills and Notes I b—Drawer of check is relieved of liability upon payment by drawee bank either in cash or by its check on another bank.**

The payee of a check has the right to demand payment by the drawee bank in cash if the drawer has therein a deposit sufficient for payment; and where a bank receives a check in payment of a note and elects to put it in the hands of a Federal reserve bank for collection, which bank accepts the check of the drawee bank on another bank in payment, when the check would have been paid in course of collection had cash been demanded, the drawer and endorsers on the original check are relieved of liability thereon, and may not be held if the check of the drawee bank was not paid because of its later insolvency, C. S., 3108, 3167, 3042; and this result is not affected by 3 C. S., 220(aa), providing that a drawee bank may pay a check drawn on it by its check on another bank, unless the face of the check demands payment in cash, when the check is presented for payment by any Federal reserve bank, since the payee bank has the option of presenting the check for payment through the Federal reserve bank or not.

6. **Bills and Notes I a—Evidence of acceptance of check by drawee bank held sufficient to be submitted to jury.**

Where the evidence is conflicting as to whether a drawee bank accepted the check of a drawer bank, charged it to the account of the drawer bank, and that the charge remained on the books of the drawee bank until the next day, when the drawee bank marked the charge "error" on account of the insolvency of the drawer bank on that day, and returned the check protested, the question of the liability of the drawee bank thereon is properly submitted to the jury, and judgment upon its verdict in favor of the plaintiff will be affirmed on appeal.

APPEAL by defendants, D. W. and W. A. Cleve, and the National Bank of New Bern, from *Moore, Special Judge,* at May Term, 1928, of BEAUFORT. In Cleves's appeal, reversed. In Bank's appeal, no error.

This is an action to recover the sum of $2,000 and interest from 13 December, 1923. The facts alleged in the complaint as constituting plaintiff's cause of action against the defendants are set out in the opinion below.

The action was begun on 23 September, 1923. The defendants named in the summons, which was duly served on each of the said defendants, are the Bank of Washington, the Federal Reserve Bank of Richmond, Virginia, D. W. and W. A. Cleve, the National Bank of New Bern, and H. P. Whitehurst, receiver of the Bank of Vanceboro. In the complaint as orginally filed and as subsequently amended by leave of court, plaintiff prays judgment that upon the facts alleged therein he recover of each and all of the defendants the sum of $2,000, with interest from 13 December, 1923.

At the close of all the evidence, plaintiff submitted to a voluntary nonsuit of the action as to the defendant, the Bank of Washington. Upon its motion for judgment as of nonsuit (C. S., 567), the action was dismissed as to the defendant, the Federal Reserve Bank of Richmond. Issues involving the liability of these two defendants upon the allegations of the complaint were withdrawn from the jury.

Issues involving the liability of the three remaining defendants were submitted to the jury and answered as follows:

1. Are the defendants, D. W. and W. A. Cleve, indebted to the plaintiff on account of the matters set out in the complaint; if so, in what amount? Answer: Yes, $2,000, and interest from 5 December, 1923.

2. If so, is said cause of action barred by the statute of limitations? Answer: No.

5. Did the National Bank of New Bern wrongfully fail and refuse to pay the check which was sent by Bank of Vanceboro to Federal Reserve Bank and by Federal Reserve Bank sent to said National Bank of New Bern for payment? Answer: Yes.

5½. Is plaintiff's cause of action as to National Bank of New Bern barred by the statute of limitations? Answer: No.

6. In what amount, if any, is National Bank of New Bern indebted to plaintiff on account of matters and things referred to in the fifth issue? Answer: $2,000, and interest.

7. In what amount is defendant, Whitehurst, receiver, indebted to plaintiff? Answer: $2,000, with interest from 5 December, 1923.

Upon the foregoing verdict, it was, on motion of counsel for plaintiff, ordered, considered and adjudged "that plaintiff recover of the defendants $2,000, with interest from 13 December, 1923, together with the costs of this action. The payment of this judgment by the defendants or either of them other than the defendant receiver, will entitle the defendants so paying to recover such dividend as may arise and accrue in the hands of the receiver in favor of the claim of the plaintiff."

From this judgment, both the defendants, D. W. and W. A. Cleve and the National Bank of New Bern, appealed to the Supreme Court.

H. C. Carter and Ward & Grimes for plaintiff.

W. C. Rodman and Guion & Guion for defendants, D. W. and W. A. Cleve.

Henry P. Whitehurst and Ward & Ward for defendant, National Bank of New Bern.

CONNOR, J. The original complaint in this action was filed on 23 September, 1924. The defendants, D. W. and W. A. Cleve, demurred to said complaint, chiefly on the ground that the facts stated therein are not sufficient to constitute a cause of action against them. From judgment sustaining said demurrer, plaintiff appealed to this Court. The judgment was affirmed. *Morris v. Cleve,* 193 N. C., 389, 137 S. E., 162.

It appeared upon the face of the complaint that plaintiff had discounted the note executed by said defendants and payable to his order, for value and before maturity, and that he was not the holder of said note at the date of the commencement of this action. It did not appear from the complaint that plaintiff was or had ever been the holder of the check drawn by the defendants on the Bank of Vanceboro, and payable to the order of the Bank of Washington. Nor did it appear that plaintiff had paid to the Bank of Washington the sum of $2,000, or any other sum, on account of his liability as an endorser on both the check and the note. It was, therefore, held that plaintiff had failed to state in his complaint facts sufficient to constitute a cause of action upon which he was entitled to recover of the defendants, D. W. and W. A. Cleve. Plaintiff was not the real party in interest with respect to the cause of action, if any, alleged in the complaint against the said defendants. He could not, therefore, prosecute the action, upon the allegations of the complaint, for it is expressly provided by statute that every action must be prosecuted by the real party in interest, except as otherwise provided. C. S., 446. Plaintiff was neither the legal nor the equitable owner of any claim against the defendants, founded upon the facts alleged in the complaint; nor was he a trustee of an express trust. *Chapman v. McLawhorn,* 150 N. C., 166, 63 S. E., 721.

The decision of this Court affirming the judgment of the Superior Court of Beaufort County, by which the demurrer to the complaint was sustained, was rendered on 23 March, 1927. The said decision was certified by the clerk of this Court to the clerk of the Superior Court of Beaufort County on the first Monday of April, 1927. C. S., 1417. Rule 38. At the April Term, 1927, of the Superior Court of Beaufort County, which began on 11 April, 1927, plaintiff moved for an order allowing him to amend his complaint. This motion was continued from the April Term to the May Term, 1927, of said court when it was heard by the judge presiding at said May Term. From his order allowing said motion, defendants, D. W. and W. A. Cleve, appealed to this Court. This appeal was dismissed on the ground that it was premature. *Morris v. Cleve,* 194 N. C., 202, 139 S. E., 230. We said that the proper procedure was for the defendants to note an exception to the order, which they insisted was erroneous, and to appeal from the final judgment, if adverse to them. The question as to whether there was error in the order allowing plaintiff to amend his complaint after it had been held that said complaint did not state facts sufficient to constitute a cause of action, is now properly presented to this Court for decision. Upon plaintiff's motion made within ten days after the receipt by the clerk of the Superior Court of Beaufort County of the certificate from the clerk of this Court, showing that the judgment of said court sustaining the demurrer to the complaint had been affirmed by this Court, the judge had the power, in the exercise of his discretion, to make the order allowing plaintiff to amend his original complaint. It is expressly so provided by statute. C. S., 515. This statute is in aid of an expeditious administration of justice and should be liberally construed and applied to the end that actions pending in the courts of this State to enforce rights alleged to have been violated or to redress wrongs alleged to have been committed, shall be tried on their merits and not dismissed because of defective pleadings. A defendant who has a good defense to an action is not ordinarily prejudiced by an amendment to the complaint therein, whereas a plaintiff may thereby be saved needless delay and useless expense. A demurrer too often serves no other purpose than merely to challenge the skill of the draughtsman of the complaint. When, as in the instant case, the court must, as a matter of law, sustain a demurrer to the complaint, on the ground that the facts stated therein are not sufficient to constitute a cause of action, the court ought to have, and by virtue of this statute, does have the power, in the exercise of its discretion, to permit an amendment to the complaint, and thus to expedite a trial on the merits of the controversy which has become the subject-matter of a civil action. A demurrer does not ordinarily deal with the merits of the controversy; it deals only with the sufficiency of the allegations of the complaint. *Furniture Co. v. R. R.,* 195 N. C., 636, 143 S. E., 242.

There was no error in the order allowing plaintiff to amend his original complaint, after the demurrer of the defendants had been sustained by both the Superior Court and the Supreme Court. Assignments of error based on exceptions by both the appealing defendants to the order, are not sustained.

After the original complaint had been amended by the plaintiff, pursuant to the order of the court, both the appealing defendants demurred *ore tenus* to the complaint as amended, upon the ground that notwithstanding the allegations of the amendment, the facts stated therein are not sufficient to constitute a cause of action, in favor of the plaintiff and against said defendants. In the original complaint it did not appear therefrom that plaintiff was the real party in interest with respect to cause of action alleged therein against the defendant. For this reason the demurrer was sustained. In the amendment to the complaint, it is alleged, in substance, that after the Bank of Washington had been notified that the check drawn by defendants, D. W. and W. A. Cleve, on the Bank of Vanceboro, payable to the order of the Bank of Washington, had not been paid, because the draft drawn by the Bank of Vanceboro, on the National Bank of New Bern, payable to the order of the Federal Reserve Bank of Richmond, had not been paid, the plaintiff was required by the Bank of Washington, by reason of his liability as endorser of said check, to pay to said Bank of Washington the amount of said check, to wit: $2,000. Upon the facts alleged in the amendment to the complaint, plaintiff was subrogated to the rights of the Bank of Washington against the defendants. Plaintiff has acquired by subrogation the right to enforce the liability of defendants, if any, founded upon the facts alleged in the complaint. *Graham v. Warehouse,* 189 N. C., 533, 127 S. E., 540. It should be noted that neither of the defendants has demurred to the original complaint or to the complaint as amended, on the ground that there was a misjoinder of parties, or of causes of action therein. C. S., 511. If the complaint was subject to demurrer on either of these grounds, the objection has been waived. C. S., 518. Each of the defendants has filed an answer to the complaint.

Assignments of error based on exceptions by both the appealing defendants to the refusal of the court to sustain their separate demurrers *ore tenus,* to the complaint, cannot be sustained. The merits of the controversy between plaintiff and defendants, which is the subject-matter of this action, are presented for trial by the pleadings.

The facts alleged in the complaint, and not denied in the answers of the defendants, and therefore admitted, are as follows:

On 16 October, 1923, the defendants, D. W. and W. A. Cleve, who are residents of Vanceboro in Craven County, North Carolina, for value received, executed their note for the sum of $2,000, payable, sixty days after date, to the order of the plaintiff, who is a resident of Washington, in Beaufort County, North Carolina.

For value and before its maturity, plaintiff, having first endorsed the said note, discounted the same at the Bank of Washington, of Washington, N. C. The amount of said note was credited to the account of plaintiff, with said Bank of Washington. Defendants, D. W. and W. A. Cleve were notified by plaintiff that the Bank of Washington held said note, and that payment of same should be made to said bank, and not to plaintiff.

On 4 December, 1923, defendants, D. W. and W. A. Cleve, having been advised by plaintiff that the Bank of Washington had declined their request to renew said note or a part thereof, at its maturity, drew their check on the Bank of Vanceboro, N. C., for the sum of $2,000, payable to the order of the Bank of Washington, and sent same by mail to plaintiff, with the request that said check be delivered to the Bank of Washington, in payment of said note. When plaintiffs tendered said check to the Bank of Washington, as requested by said defendants, he was required by said bank to endorse the same, because of his liability, as endorser on the note. The check for $2,000, endorsed by plaintiff, was accepted by said bank, in payment of said note, on 6 December,

1923. The note marked "Paid, Bank of Washington," was sent by mail to the defendants, D. W. and W. A. Cleve.

The Bank of Washington, having accepted the check drawn by the defendants, D. W. and W. A. Cleve, on the Bank of Vanceboro, and endorsed by plaintiff, in payment of said note, forwarded the same by mail to the Federal Reserve Bank of Richmond, Virginia, for collection. The Federal Reserve Bank received said check and forwarded same by mail to the Bank of Vanceboro, for payment. The Bank of Vanceboro received said check, and charged same to the account of defendants, D. W. and W. A. Cleve. The said check marked "Paid," was thereafter delivered by the Bank of Vanceboro to said defendants.

On 10 December, 1923, the Bank of Vanceboro drew its check on the National Bank of New Bern of New Bern, N. C., payable to the order of the Federal Reserve Bank of Richmond, and forwarded same by mail to said Federal Reserve Bank in remittance of the proceeds of the check of defendants, D. W. and W. A. Cleve, payable to the order of the Bank of Washington. The Federal Reserve Bank received said check, and forwarded same to the National Bank of New Bern, for payment. The National Bank of New Bern received said check, on 12 December, 1923, and declined to pay same. The said check was protested for nonpayment on 13 December, 1923. On said day the Bank of Vanceboro closed its doors and ceased to do business. It was thereafter duly adjudged insolvent.

The Bank of Washington was advised by the Federal Reserve Bank that the check drawn by defendants, D. W. and W. A. Cleve, and payable to its order, although duly presented for payment, had not been paid. The Bank of Washington thereupon charged the amount of said check, to wit, $2,000, to the account of plaintiff, because of plaintiff's liability as endorser on said check, and also because of his liability as endorser on the note, for the payment of which said check had been delivered to said bank. Plaintiff admitted his liability to the Bank of Washington, and conceded the right of said bank to charge his account with the sum of $2,000, by reason of said liability.

With respect to the liability of defendants, D. W. and W. A. Cleve, to the plaintiff for the sum demanded in this action, there was evidence tending to show not only the facts admitted in the pleadings, as above stated, but also that continuously from the date of their check on the Bank of Vanceboro, payable to the order of the bank of Washington, to the date on which the Bank of Vanceboro closed its doors and ceased to do business because of its insolvency, including the date on which said check was charged to their account, and marked "Paid," by said bank, the said defendants had on deposit with said Bank of Vanceboro, to their credit, and subject to their check, a sum largely in excess of the amount of said check. There was no evidence to the contrary.

There was evidence also tending to show that continuously from the date of said check to the date on which the said Bank of Vanceboro closed its doors and ceased to do business, because of its insolvency, the said Bank of Vanceboro was open during banking hours, for the transaction of business, receiving deposits and paying checks in the usual course of business; that on the date of its receipt from the Federal Reserve Bank of Richmond of defendants' checks for $2,000, payable to the order of the Bank of Washington, the Bank of Vanceboro had in its vaults, currency and cash, largely in excess of the amount of said check, which was available for its payment; and that in addition to said currency and cash, the said Bank of Vanceboro had at said date to its credit, and subject to its check or draft, in solvent banks, deposits in excess of the amount of said check, which were available for its payment. If payment of said check, in currency or in cash, or by check or draft on some correspondent bank, other than the National Bank of New Bern, had been demanded, on the day of its receipt through the mail from the Federal Reserve Bank, such payment could and would have been made by the Bank of Vanceboro. The books of the Bank of Vanceboro, on the date of its check on the National Bank of New Bern, payable to the order of the Federal Reserve Bank of Richmond, showed that said Bank of Vanceboro had to its credit with the National Bank of New Bern, subject to its check or draft, a sum sufficient for the payment of said check. There was no evidence to the contrary.

For the purpose of deciding the principal question presented for decision by the appeal of the defendants, D. W. and W. A. Cleve, it may be conceded that the check of the Bank of Vanceboro on the National Bank of New Bern, was duly presented for payment, and that upon such presentation the said check was not paid by the National Bank of New Bern. This question is presented by defendants' assignment of error based on their exception to the refusal of the court to allow their motion, at the close of all the evidence, for judgment of nonsuit (C. S., 567), and may be stated as follows: Was the check of the defendants, D. W. and W. A. Cleve, on the Bank of Vanceboro, payable to the order of the Bank of Washington, upon the facts which all the evidence with respect to the liability of these defendants to plaintiff, in this action, tends to show, paid by the Bank of Vanceboro, with the result that said defendants were discharged as drawers of said check, and also as makers of the note executed by them, and held by the Bank of Washington, as a purchaser for value from plaintiff?

If said check was not paid, then the note remains due and unpaid, and defendants are liable not only as drawers of the check, but also as makers of the note. *Bank v. Barrow,* 189 N. C., 303, 127 S. E., 3. The check was accepted by the Bank of Washington in payment of the note, conditionally. There was no evidence of a special agreement by which the Bank of Washington accepted said check in payment of the note, absolutely.

It is well settled as a general rule of law that a check when duly presented for payment, and accepted by the drawee bank, is payable in money. The payee or holder of the check has the right to demand of the drawee bank, when the check is accepted for payment, that payment shall be made in money. If the bank refuses to pay the check in money, the payee or holder may retain possession of the check, and hold the drawer liable for the amount thereof. If, however, the payee or holder accepts from the drawee bank payment in any medium other than money, and surrenders the check, as he may do, he does so at his risk, and not at the risk of the drawer. In such case, the drawer is discharged of liability on the check, just as if payment had been made in money, notwithstanding any loss which the payee or holder may thereafter sustain. The drawer of the check is discharged of liability when the check has been paid, either in money, or otherwise at the option of the payee or holder.

In *Federal Reserve Bank v. Malloy,* 264 U. S., 160, 68 L. Ed., 617, 31 A. L. R., 1261, it is held that the acceptance by a collecting bank, as agent for the payee or holder, of the check or draft of the drawee bank, in payment of the check of the drawer, has the effect of releasing the drawer; the drawer is thereby discharged, for the reason that as between him and the payee or holder his check has been paid. In the opinion in that case, the following quotation from *Anderson v. Gill,* 79 Md., 317, 25 A. L. R., 200, 47 Am. St. Rep., 29, Atl., 527, is approved, as a correct statement of the law:

"Now, a check on a bank or banker is payable in money, and in nothing else. Morse, Banks and Banking (2 ed.), 268. The drawer having funds to his credit with the drawee has a right to assume that the payee will, upon presentation, exact in payment precisely what the check was given for, and that he will not accept, in lieu thereof, something for which it had not been drawn. It is certainly not within his contemplation that the payee should, upon presentation, instead of requiring cash to be paid, accept at the drawer's risk a check of the drawee upon some other bank or banker."

In *City of Douglass v. Federal Reserve Bank of Dallas,* 271 U. S., 489, 70 L. Ed., 1051, it is held that payment of a check sent by a collecting bank to the drawee is effected by its debiting the drawer's account with its amount, stamping it "Paid," returning it to the drawer, and forwarding its own check to the collecting bank for the amount. Upon the authority of *Malloy v. Federal Reserve Bank, supra,* it is said: "The check was paid, and the drawer and endorsers discharged."

A check is defined in the Uniform Negotiable Instruments Act, which has been enacted by the General Assembly of this State, as "a bill of exchange drawn on a bank payable on demand." C. S., 3167. It is, therefore, an unconditional order in writing, addressed to a bank, signed by the drawer, requiring the bank to which it is addressed, upon its presentation, and upon demand to pay a sum certain in money to the payee, or to his order or to bearer. C. S., 3108. The drawer, by drawing the check engages that on due presentment it will be paid in money, if such payment is demanded by the payee or holder, and that if it be dishonored by nonpayment, and the necessary proceedings on dishonor be duly taken, he will pay the amount of the check to the payee or holder. C. S., 3042. If the check is duly presented and paid by the drawee bank according to its tenor, the drawer is discharged. If the payee or holder waives his right to demand payment in money, and accepts payment from the drawee bank in any medium other than money, he does so at his risk, and not at the risk of the drawer. In the latter case, the drawer is discharged equally as in the former. If the law was otherwise, the drawer of a check could be held liable for the default not only of his drawee, but also of others of whose existence he was ignorant when he drew his check, and delivered it to his creditor.

It is contended, however, that the rule recognized and applied by the Supreme Court of the United States that a check is payable only in money has been changed in this State by statute. Chapter 20, Public Laws 1921.

It has been held that this statute, authorizing in certain instances payment of a check by the check or draft of the drawee bank on another bank, does not violate any of the provisions of the Constitution of the United States. *Farmers & Merchants Bank v. Federal Reserve Bank,* 262 U. S., 649, 67 L. Ed., 1157. In the opinion in that case, in answer to the argument that the statute compels a Federal Reserve Bank to accept in payment of checks, drawn on banks in this State, exchange drafts on reserve deposits, whether good or bad, and, therefore, deprives such bank of its liberty to contract, it is said: "To this argument the answer is clear. The purpose of the statute, as its title declares, was to promote the solvency of banks. We should in the absence of controlling decisions by the highest Court of the State to the contrary, construe the statute not as authorizing payment in a 'bad' draft, but as authorizing payment in such exchange drafts only as had customarily been used in remitting for checks."

When a drawee bank has accepted the check of its depositor, which it has received through the mail, from the payee or holder, or from a collecting bank, and has charged the amount of said check to the depositor's account, the drawee bank becomes the debtor of the payee or holder, or of the collecting bank for the proceeds of the check. *Corp. Com. v. Bank,* 137 N. C., 697, 50 S. E., 308. By accepting the check, and charging its amount to the account of its depositor, the drawee bank has discharged its debt to its depositor, *pro tanto.* It is no longer the debtor of the drawer of the check, for the amount thereof; it has become the debtor of the owner of the check. When the bank in discharge of its liability to the owner of the check, for the amount thereof, remits the proceeds of the collection made by it, to the owner of the check, by its check or draft on another bank, such check or draft is in payment of its debt to such owner, and not in payment of a debt of the bank to the drawer of the check. The check or draft forwarded in payment of its debt, is a conditional payment, only; if such check or draft is not paid, upon due presentment, and is therefore "bad," the bank, as drawer of the check, is liable not only on the check, but also for its debt to the owner of its depositor's check. The well settled principle that in the absence of a special agreement to the contrary acceptance of a check does not operate as payment of a debt, unless the check is paid, is applicable to the exchange check or draft, and not to the check of the depositor, which the bank has accepted and charged to his account. We do not construe the statute as authorizing a bank in this State to pay its debt by a "bad" check or draft. A creditor of the bank who accepts its check or draft in payment of its debt to him, upon nonpayment of such check, may hold the bank liable either on the check, or on the debt. The relationship of debtor and creditor, with respect to the amount of the check, between the bank and its depositor was ended when the bank charged the check to the account of the depositor, the bank at the time having money in its possession sufficient and available for the payment of the check. The depositor's check having been paid, the bank becomes the debtor of the owner of the check, for its amount.

In *Cleve v. Craven Chemical Co.,* 18 Fed. (2d) 711, 52 A. L. R., 980, the United States Circuit Court of Appeals, Fourth District, recognizes the general rule that acceptance of the check or draft of the drawee bank, in payment of a check drawn on such bank, operates as payment of the check, and discharges the drawer of the check from further liability. In the opinion in that case, it is said that "the reason of the rule is that a check is payable only in cash, and if the holder accepts something other than cash, he assumes the risk incident thereto and is estopped to deny payment as against the drawer." It is held, however, that this rule has been changed by statutes in this State, and that as the drawer of the check did not specify in the face of the check that payment should be made in cash, he must be held by reason of the statute to have impliedly agreed that the drawee bank might pay the check by an exchange draft on reserve deposits, if the check should be presented by or through a Federal Reserve Bank. It is said: "The Reserve Bank could not require payment in any other medium, *Federal Land Bank v. Barrow,* 189 N. C., 303, 127 S. E., 3. The Reserve Bank, therefore, presented a check which, under the law, the Bank of Vanceboro was authorized at its option to treat as an order for an exchange draft. When it exercised this option, and gave an exchange draft pursuant to the order, was such draft payment, when not itself paid? We think not."

Section 2, chapter 20, Public Laws 1921 (3 C. S., 220aa), which is the only provision of the statute pertinent to a decision of the question here presented, is as follows:

"In order to prevent accumulation of unnecessary amounts of currency in the vaults of the banks and trust companies chartered by this State, all checks drawn on said banks and trust companies shall unless specified on the face thereof to the contrary by the maker or makers thereof, be payable at the option of the drawee bank, in exchange drawn on the reserve deposits of said bank, when any such check is presented by or through any Federal Reserve Bank, postoffice or express company, or any respective agents thereof."

This statute being in derogation of a general rule of law should be construed strictly. *Price v. Edwards,* 178 N. C., 493, 101 S. E., 33. In the opinion in the cited case, *Walker, J.,* quotes with approval from Black on Interpretation of Laws, page 367, as follows: "It is a rule generally observed (except where prohibited by statute), that acts of the Legislature made in derogation of the common law will not be extended by construction; that is, the Legislature will not be presumed to intend innovations upon the common law, and its enactments will not be extended in directions contrary to the common law, further than indicated by the express terms of the law, or by fair and reasonable implications from its nature or purpose or the language employed."

As said by *Parker, Circuit Judge,* in *Cleve v. Craven Chemical Company, supra:* "The history and purpose of the act, and particularly of this section (section 2, quoted in the opinion) are clearly set forth in the opinion of *Mr. Justice Brandeis* in *Farmers & Merchants Bank v. Federal Reserve Bank, supra."* The statute was enacted to relieve banks and trust companies, chartered by this State, of embarrassments growing out of the policy theretofore pursued by the Federal Reserve Bank of

Richmond, with respect to the collection by said reserve bank of checks drawn on said banks and trust companies. The statute does not deal with or purport to deal with the rights or liabilities of depositors who in the transaction of their business draw checks on their deposits with said banks and trust companies. Neither their rights nor their liabilities with respect to their checks are affected by the statute. The purpose of the statute, and its only effect, is to confer upon banks and trust companies chartered by this State, the right, in certain instances, to pay checks drawn on them in a medium other than money, and to deprive the payee or holder of such checks of the right to demand payment in money.

When a depositor therein draws his check on a bank or trust company, chartered by this State, and delivers same to the payee, the general rule of law that such check is payable, upon due presentment, in money, or at the option of the payee or holder, in a medium other than money—such payment being at the risk of the payee or holder, and not at the risk of the drawer—is in force in this State. The general rule of law is not changed by the statute, as we construe its provisions. The construction to the contrary in *Cleve v. Craven Chemical Company, supra,* does not seem to us, after full and careful consideration, to be sustained by the authorities, or to be supported on principle.

The payee or holder of a check drawn on a bank or trust company, chartered by this State, may or may not, at his option, cause the check to be presented for payment "by or through a Federal Reserve Bank, postoffice or express company, or any respective agents thereof." If the check is presented for payment, in person, or by an agent for collection other than as prescribed by statute, payment in money may be required; it is only when the check is presented "by or through a Federal Reserve Bank, postoffice or express company, or any respective agent thereof," that payment may be made, at the option of the drawee bank, in exchange drawn on the reserve deposit of said bank. It is true that under the statute, the drawer has the right to specify on the face of the check, that payment shall be made in money, and that in this case, the drawee bank or trust company, must pay in money, in any event. However, the payee or holder has the option to determine the agency by which presentment shall be made. If he selects as his agent for collection a Federal Reserve Bank, he impliedly authorizes such agent to accept in payment the check of the drawee bank on another bank. This he does at his own risk, and not at the risk of the drawer of the check. When the drawee bank has to the credit of the drawer funds sufficient and available for the payment of his check, and accepts and charges the check to the drawer's account, the check is paid, and the drawer is discharged of liability not only on the check, but also for the debt in payment of which the check was drawn and delivered. *Dewey Bros. v. Margolis,* 195 N. C., 307, 142 S. E., 22; *Quarles v. Taylor,* 195 N. C., 313, 142 S. E., 25.

There was error in the refusal of the court to allow the motion of defendants, D. W. and W. A. Cleve, at the close of all the evidence, that the action as against them be dismissed as of nonsuit. For this error the judgment that plaintiff recover of the defendants, D. W. and W. A. Cleve, the sum of $2,000, and interest, must be reversed.

The facts alleged in the original complaint, as constituting plaintiff's cause of action against the defendant, the National Bank of New Bern, are as follows:

"Sec. 3. That a certain draft drawn by the Bank of Vanceboro, as agents of the defendants, Cleves, and by their consent and intended by it to be in payment of said check, was presented to the defendant, the National Bank of New Bern, on or about 13 December, 1923, and refused payment.

"Sec. 4. That he is informed and believes and alleges that it was the duty of the said National Bank of New Bern to pay said draft at the time it was received, and that its failure to do so was wrongful and unlawful, and directly caused the loss to the plaintiff hereinafter set out."

At May Term, 1928, during the trial of the action, plaintiff was permitted, over the objection of said defendant, to amend paragraph four of his complaint by adding thereto the following:

"It (the National Bank of New Bern) having in fact accepted the same by entering it on the books as a charge against the Bank of Vanceboro, and credited it to the sender, and held it for more than 24 hours thereafter during which it failed and refused to return it accepted or nonaccepted."

There was no error in the order permitting the plaintiff to amend his complaint. The effect of the amendment was to aid a defective statement of a good cause of action alleged in the complaint, and not to allege a new cause of action. Amendments to pleadings are ordinarily within the discretion of the court. C. S., 547. It is said in *Lefler v. Lane,* 170 N. C., 181, 86 S. E., 1022, that under our present system of procedure "the power of amendment has been very broadly conferred and may and ordinarily should be exercised in furtherance of justice, unless the effect is to add a new cause of action or change the subject-matter thereof, and our cases on the subject hold that, when the amendment is germane to the original action, involving substantially the same transaction, and presenting no real departure from the demand as originally stated, it shall, when allowed, have reference by relation to the original institution of the suit." See cases cited by *Hoke, J.*

Defendant, the National Bank of New Bern, filed an answer in which it specifically denied the allegations of the fourth paragraph, as amended. There was conflicting evidence relative to the fifth issue, which involves the questions presented by the pleadings as to the liability of the defendant, the National Bank of New Bern. This evidence was submitted to the jury under instructions which are full, clear and free from error. The evidence for the plaintiff tended to show that when it received the check drawn by the Bank of Vanceboro on it, the National Bank of New Bern charged the same to the account of said Bank of Vanceboro, in due course of business; that said charge remained on the books of the National Bank of New Bern until the next day; and that because of the refusal in the meantime of the National Bank of New Bern to extend further credit to the Bank of Vanceboro, on collaterals in the hands of said National Bank of New Bern, the Bank of Vanceboro closed its doors on the next day. The charge against the Bank of Vanceboro of the amount of its check, was marked "error," on the next day, and its draft was protested. Although there was evidence on behalf of the defendant in contradiction of the evidence of the plaintiff, tending to show that the draft of the Bank of Vanceboro was accepted and paid by the National Bank of New Bern, and that the National Bank of New Bern thus collected the draft and failed to remit the proceeds, the jury found in accordance with the contentions of the plaintiff, as shown by the answer to the fifth issue.

Assignments of error relied upon by the National Bank of New Bern on its appeal to this Court have been carefully considered. They cannot be sustained. The judgment that plaintiff recover of said defendant the sum of $2,000, and interest is affirmed.

The receiver of the Bank of Vanceboro has not appealed from the judgment that plaintiff recover of him the sum of $2,000 and interest. As the jury found that the check of the Bank of Vanceboro on the National Bank of New Bern was paid, and that said bank is now indebted to the plaintiff for the proceeds of said check, it would seem that the judgment against the receiver is not consistent with the judgment against the National Bank of New Bern. This matter is not, however, presented on the record.

Our conclusion is that the judgment against defendants, D. W. and W. A. Cleve must be reversed; and that on the appeal of the defendant, the National Bank of New Bern, there is no error.

Reversed in appeal of D. W. and W. A. Cleve.

No error in appeal of First National Bank of New Bern.

W. L. BROWN v. C. M. SHEETS, W. G. LINDSAY AND ARCHIE ELLEDGE, TRUSTEE.

(Filed 22 May, 1929.)

1. **Appeal and Error J c—Findings of fact supported by sufficient evidence will be sustained.**

   Where the trial court is authorized to find the issuable facts in controversy in lieu of a jury, his findings supported by sufficient legal evidence will be sustained on appeal.

2. **Same—Finding that jury trial was waived controlling on appeal in absence of proof to the contrary by appellant.**

   Where the statute authorizing the establishment of a county court provides that a party waives his right to a jury trial unless he demands it, the finding of the court that a jury trial had been expressly waived by the parties litigant will be controlling on appeal, the presumption being in favor of the correctness of the proceedings with the burden of showing error on the appellant.

3. **Mortgages H m—Subsequent purchaser without notice of irregularities in foreclosure sale takes title free from infirmities.**

   The sale of land under foreclosure of a mortgage or deed of trust is only voidable for failure to advertise for the period of time fixed by law, and the innocent purchaser at the foreclosure sale, without notice of an irregularity, acquires the absolute title which he may convey to another who likewise holds it unaffected by the infirmity, if he has not participated in the fraud or irregularity.

4. **Mortgages H p—Mortgagor not entitled to have sale set aside for irregularities as against purchaser for value without notice.**

   Where lands have been foreclosed under mortgage or deeds of trust and many times resold under the provisions of C. S., 2591, and the owner of the equity of redemption has not protected himself at the sales, he may not have the deed at the final foreclosure sale set aside for irregularity when the last purchaser is an innocent purchaser for value in good faith.

5. **New Trial B g—Newly discovered evidence must not be merely accumulative to entitle movant to new trial.**

   The party moving for a new trial upon the ground of newly discovered evidence must show to the sound discretion of the trial court, its materiality and competency, and that he was not guilty of laches in not discovering it in time for introduction at the trial, and that the evidence is not merely cumulative and its reception would probably change the verdict as rendered.

APPEAL by plaintiff from *Moore, J.*, at .... Term, 1929, of FORSYTH. No error.

This action was tried in the County Court of Forsyth County, N. C., before Judge Oscar O. Efird. The following judgment was rendered:

"This cause coming on to be heard, and being heard at 15th October, 1928, Term of the Forsyth County Court, and neither the plaintiff nor the defendants in their pleadings, having asked for jury trial, and both the plaintiff and the defendants having in open court, through their respective counsel, entered of record consented that a jury should be dispensed with, and that the judge of the Forsyth County Court should find the facts in the case, and on such findings of fact should enter a judgment in accordance with law, such agreement being made in the presence of all parties to the action, and both the plaintiff and the defendants having introduced evidence, and having argued the case, thereupon the court makes the following findings of fact, such findings of fact being in addition to the formal admissions made by the parties in open court:

Finding No. 1: The plaintiff, W. L. Brown, through his agent, J. G. Nance, became the last and highest bidder at the foreclosure sale held on 9 September, 1925.

Finding No. 2: Such bid made by the plaintiff, through his agent, J. H. Nance, was made in bad faith, and for the purpose of wrongfully delaying and preventing the foreclosure of the deed of trust, and without intent to comply with the terms of such bid.

Finding No. 3: The sale held on 2 December, 1925, was advertised by the trustee under the order of the clerk of Superior Court dated 20 October, 1925, by the publication of a notice in the *Twin-City Sentinel*, a newspaper published in Forsyth County, on the 18th and on the 25th days of November, 1925, and also by posting such notices at the courthouse door and three other public places in Forsyth County for fifteen days prior to such sale, such notice being in due form, and such notice, both as to form and manner of publication, complying with the terms of the order of resale of the clerk of the Superior Court for Forsyth County, dated 20 October, 1925. The sale on 2 December, 1925, was held on Wednesday, and was the third day of a term of the Superior Court for Forsyth County.

Finding No. 4: C. M. Sheets, one of the defendants, became the purchaser from Mock and Wiseman, the purchasers at the foreclosure sale, of the lands described in the complaint for a valuable consideration ($1,433.66) in good faith, and without knowledge of any irregularities in the foreclosure proceedings.

Finding No. 5: The defendant, W. G. Lindsay, thereafter became the purchaser from C. M. Sheets of the part of the lands described in the complaint for a valuable consideration, with notice that the foreclosure sale of 2 December had been advertised by notices published in the newspaper for only once a week for two weeks preceding the sale; and with notice that the plaintiff claimed the sale and had been irregularly held and that the plaintiff claimed to be the owner of the property; that the said W. G. Lindsay did not in any way participate in the manner or method of advertising such resale, or any irregularities connected therewith.

Finding No. 6: That there was a delay and a postponement of the resale advertised for 5 November, 1925, such delay being granted at the request of the plaintiff, and that such delay was not a waiver or condonation of the conduct of the plaintiff in bidding in bad faith at the sale held on 9 September, 1925, as set out in findings of fact No. 2.

Finding No. 7: That the deed of trust under which such property was sold, same being recorded in the registry of Forsyth County, Book of Deeds of Trust 176, page 132, secured a note in the sum of $1,007.50 with interest; that the same was past due and unpaid; that at the request of the holders of said note (Mock and Wiseman), the trustee, A. R. Bridgers, duly advertised said property for sale in April, 1925, and thereafter on increased bids being filed with the clerk of the Superior Court for Forsyth County, several resales were duly ordered by said clerk and duly advertised, and that a resale was duly ordered by the clerk of the Superior Court for Forsyth County to be held on 9 September, 1925, and such sale was duly advertised. And, that as a matter of law, all proceedings were regular up to and through the sale of 9 September, 1925, except as appears in the second finding of fact above.

The above findings of fact cover all issues raised by the pleadings or tendered by either party to the action, except the issues tendered by defendant, Lindsay, relating to betterments.

On such findings of fact the court orders, adjudges and decrees, that the plaintiff take nothing by his action, and that the same be dismissed, and the costs be taxed against the plaintiff:

Further, that the court orders, adjudges and decrees that the title of C. M. Sheets and W. G. Lindsay in and to the lands described in the complaint is good, and that the plaintiff, W. L. Brown, has no right, title, interest or estate whatsoever in or to said lands; that all claims of the said W. L. Brown in or to such lands are hereby adjudicated and resolved against him, and that insofar as the said W. L. Brown is concerned the title and estate of the said defendants under their respective deeds referred to above are hereby quieted and declared to be valid."

Numerous exceptions and assignments of error were made and on appeal to the Superior Court the following judgment was rendered: "This cause coming on to be heard before his Honor, Walter E. Moore, judge, on appeal from the Forsyth County Court, from a judgment in favor of the defendants, and the court having heard argument of counsel and having considered the exceptions of the plaintiff as appear in the record and having found that none of the exceptions of the plaintiff constitute reversible error and that the judgment of the Forsyth County

Court should be affirmed: It is, therefore, ordered, adjudged and decreed that each and every one of the exceptions of plaintiff are overruled and the judgment of the Forsyth County Court is hereby affirmed; and it is ordered that the action be remanded to the Forsyth County Court for disposition in accordance with this judgment, and that the costs of the appeal be taxed against the plaintiff."

From this judgment the plaintiff, appellant, made numerous exceptions and assignments of error and appealed to the Supreme Court.

Richmond Rucker and John J. Ingle for plaintiff.
Parrish & Deal and W. T. Wilson for defendants.

CLARKSON, J. The main and material question: Plaintiff, appellant, excepts and assigns error to the refusal of the court to grant the plaintiff's motion for judgment on the pleadings: "The appellant contends that judgment for the plaintiff on the pleadings should have been granted for the reason that the answer and further defense clearly show that the sale under foreclosure was irregular and that from the records incorporated by reference in their pleadings the defendants had notice or acted in bad faith in acquiring the property." We cannot so hold. The record discloses that the court below found the facts to the contrary and there was sufficient evidence to sustain the findings. *In the Matter of Assessment Against R. R.,* 196 N. C., at p. 758-9.

Chapter 520, Public-Local Laws of 1915, sec. 3(a), the act establishing the Forsyth County Court provides: "That in the trial of civil cases in said court either the plaintiff at the time of filing the complaint or the defendant at the time of filing the answer may in his pleadings demand and have a jury trial as provided in the trial of causes in the Superior Court; that failure to demand a jury trial at the time herein provided shall be deemed a waiver of the right to a trial by jury; that the judge of said court, when in his opinion the ends of justice would be best served by submitting the issues to the jury, may have a jury called of his own motion and submit to it such issues as he may deem material."

Under the statute, neither party requested a jury trial. The judgment of the Forsyth County Court so finds and further that the agreement to waive a jury trial was "entered of record." C. S., 568. *Morris v. Bogue Corporation,* 194 N. C., 279; *Burlington Hotel Corp. v. Dixon,* 196 N. C., 265. The presumption is that the proceedings in the court below are correct and the appellant must show error. *Parker v. Debnam,* 195 N. C., at p. 60.

The record "imports verity." *S. v. Wheeler,* 185 N. C., 670; *S. v. Palmore,* 189 N. C., 538; *S. v. Berry,* 190 N. C., 363.

The court below found: C. M. Sheets, one of the defendants, became the purchaser from Mock and Wiseman, the purchasers at the foreclosure sale, of the lands described in the complaint for a valuable consideration ($1,433.66) in good faith, and without knowledge of any irregularities in the foreclosure proceedings.

In *Jenkins v. Griffin,* 175 N. C., 184, 186, it is said: "The presumption of law is in favor of the regularity in the execution of the power of sale; and if there was any failure to advertise properly the burden was on defendant (here on plaintiff) to show it." *Douglas v. Rhodes,* 188 N. C., at p. 584.

In *Hinton v. Hall,* 166 N. C., p. 480, it was said: "It was true that failure to advertise according to the terms of the power of sale invalidates the sale, *Eubanks v. Becton,* 158 N. C., 230. But it is said that such sale is not absolutely void, but will pass the legal title. *Eubanks v. Becton, supra; Brett v. Davenport,* 151 N. C., 58. While such sale would be set aside as to the purchaser, a subsequent or remote grantee without notice and in good faith takes a good title against such defects or irregularities in the sale of which he had no notice. 27 Cyc., 1494." *Whitley v. Powell,* 191 N. C., at p. 477; 19 R. C. L., 623.

The defendant, Sheets, therefore, got a good title because the court below found that he was a bona fide purchaser from the purchasers at the foreclosure sale for value, and without notice of any irregularities. As to the defendant, Lindsay, to whom Sheets subsequently sold a part of these lands, the court has found on disputed evidence that Lindsay had been informed that there were claims of irregularities in the foreclosure prior to the time he purchased. This is immaterial, because once Sheets had acquired good title, he had the right to convey good title to any one who had not participated in any wrongdoing. If this was not so a bona fide purchaser for value without notice would have the title to his land "bottled up."

2 Pomeroy's Equity Jurisprudence (4 ed.), sec. 754, states the rule as follows: "There are two special rules on the subject which have been settled since an early day; one being a mere application of the general doctrine, and the other a necessary inference from it. The first is, that if a second purchaser for value and without notice purchases from a first purchaser who is charged with notice, he thereby becomes a bona fide purchaser and is entitled to protection. This statement may be generalized. If the title to land, having passed through successive grantees, and subject in the hands of each to prior outstanding equities, comes to a purchaser for value and without notice, it is at once freed from these equities; he obtains a valid title, and, with a single exception, the full power of disposition. This exception is, that such a title cannot be conveyed, free from the prior equities, back to a former owner

who was charged with notice. If A., holding a title affected with notice, conveys to B., a bona fide purchaser, and afterwards takes a reconveyance to himself, all the equities revive and attach to the land in his hands, since the doctrine requires not only valuable consideration and absence of notice, but also *good faith.* The second rule is, that if a second purchaser with notice acquires title from a first purchaser who was without notice, and bona fide, he succeeds to all the rights of his immediate grantor. In fact, when land once comes, freed from equities, into the hands of a bona fide purchaser, he obtains a complete *jus disponendi,* with the exception last above mentioned, and may transfer a perfect title even to volunteers."

In *Phillips v. Buchanan Lumber Co.,* 151 N. C., at 521, this Court, speaking to the subject, said: "Besides, a purchaser for value from one whose deed was procured by fraud gets a good title if he has no notice of the fraud. *Odom v. Riddick,* 104 N. C., 515, and cases there cited. Even a purchaser with notice of the fraud from an innocent purchaser without notice gets good title. *Glenn v. Bank,* 70 N. C., 205; *Fowler v. Poor,* 93 N. C., 466."

It appears from the record that numerous resales of the property in controversy were had in accordance with C. S., 2591. It is alleged by defendants "more than ten times being advertised, each time for sale and resale, according to law." This matter has been recently discussed in *Hanna v. Car. Mortgage Co., ante,* 184. We need not repeat. It is there said that "It is a statute that does not hurt the mortgagee, but is beneficial to the mortgagor and often saves mortgaged property from being sacrificed." The plaintiff had opportunity, time and time again, to bid on the property in controversy at resales, and as the holder of the equity of redemption to protect himself. He slept on his rights and, although a hardship, we cannot change well settled principles of law. "Hard cases are the quicksands of the law." *Leak v. Armfield,* 187 N. C., 625.

The plaintiff's motion for a new trial on the ground of newly discovered evidence cannot be allowed. We have read the affidavits carefully. The law in regard to newly discovered evidence is well stated in *Johnson v. R. R.,* 163 N. C., at p. 453: "Applications of this kind, as we have held, should be carefully scrutinized and cautiously examined, and the burden is upon the applicant to rebut the presumption that the verdict is correct and that there has been a lack of due diligence. 14 Am. and Eng. Enc. Pl. and Pr., 790. We require, as prerequisite to the granting of such motions, that it shall appear by the affidavit: (1) That the witness will give the newly discovered evidence; (2) that it is probably true; (3) that it is competent, material and relevant; (4) that due diligence has been used and the means employed, or that there has been no laches, in procuring the testimony at the trial; (5) that it is not merely cumulative; (6) that it does not tend only to contradict a former witness or to impeach or discredit him; (7) that it is of such a nature as to show that on another trial a different result will probably be reached and that the right will prevail," citing numerous authorities.

This decision has been cited time and time again. The newly discovered evidence is merely cumulative.

As to the regularity of the sale, for the reasons given on the other aspects of the case, it is not necessary to consider, but see *Guilford v. Georgia Co.,* 109 N. C., 310; *Whitley v. Powell,* 191 N. C., 476.

From a thorough examination of the record, carefully prepared briefs and affidavits on the motion, we can find in law

No error.

SALLIE H. JONES, ADMINISTRATRIX C. T. A. OF THE LAST WILL AND TESTAMENT OF S. V. PICKENS, DECEASED, AND AS COMMISSIONER APPOINTED BY THE COURT, v. C. S. FULLBRIGHT AND MICHAEL SCHENCK, EXECUTORS OF THE LAST WILL AND TESTAMENT OF CORNELIA S. PICKENS, DECEASED.

(Filed 22 May, 1929.)

1. **Gifts A b—Certificate of deposit in husband's name, payable to husband's or wife's order is not gift inter vivos to wife.**

   A certificate of deposit issued by a bank in the name of the husband, payable to his or his wife's order on return of the certificate properly endorsed, creates an agency in the wife to withdraw the money which is revoked at the death of the husband, and does not operate as a gift *inter vivos.*

2. **Same—Deposit in name of husband, payable to order of husband or wife does not fall within provisions of C. S., 230.**

   The certificate of deposit by a bank in the name of the husband, payable to himself "or" his wife does not fall within the provisions of C. S., 230, the statute applying only where the deposit is made in the names of two persons and payable to either, nor can construing the word "or" as meaning "and" have the effect of creating a tenancy in common.

3. **Wills E b—Wife takes only life estate in personalty bequeathed to her for life with power of disposition during her life.**

   A bequest to the wife by her husband of all his personal property during her life, to dispose of as she may see fit, and such not disposed of to be sold after her death, with limitation over to his and her heirs, does not give the wife the power to dispose of any of the property by will.

4. **Same—Certificate of deposit in husband's name, payable to husband or wife, does not operate to enlarge life estate in personalty to her.**

   Where a certificate of deposit issued by a bank in effect creates an agency in the wife to withdraw the money during her husband's lifetime, it cannot be held that the provisions in the husband's will bequeathing his personalty to her for life to dispose of as she pleased during her life, with limitation over, enlarges the wife's life estate or gives her the power of disposition by will.

APPEAL by defendants from *MacRae, Special Judge,* at March Term, 1929, of HENDERSON. Affirmed.

The material facts are admitted. S. V. Pickens died on 19 June, 1919, leaving a will in which he appointed as executrix his wife, Cornelia S. Pickens, who duly qualified as such on 28 July, 1919. On 26 April, 1919, S. V. Pickens deposited in the Citizens National Bank of Hendersonville the sum of $13,194.66, for which he received from the bank four certificates of deposit in the respective sums of $6,679.66, $5,315, $1,000, and $200. Each certificate was in the following form:

"THE CITIZENS NATIONAL BANK
of Hendersonville, N. C.

HENDERSONVILLE, N. C., 26 April, 1919.

The Citizens National Bank.

This is to certify that S. V. Pickens has deposited in this bank six thousand, six hundred seventy-nine dollars sixty-six cents ($6,679.66). Not subject to check. Payable to the order of self or Cornelia S. Pickens, his wife, on the return of this certificate properly endorsed with interest at the rate of 4 per cent per annum if left on deposit three months or longer. Interest to cease after twelve months unless renewed.

No. 3424. C. S. FULLBRIGHT, *Cashier.*"

Cornelia S. Pickens as executrix collected from the bank $13,332.50, the face of the certificates with interest. She claimed one-half this amount ($6,666.25) as her individual property because the certificates were "payable to the order of self or Cornelia S. Pickens, his wife," and charged herself as executrix with the other half. Out of the half with which she thus charged herself she paid claims against her husband's estate, the costs of administration, $1,000 for the gravestone, $50 as a legacy to John C. Pickens, aggregating $3,819.33, leaving of this fund $2,846.42. She placed this balance, together with $1,016.66, which she had received from other securities, with the $6,666.25 which she claimed independently of the will, making a total of $10,529.33. During her lifetime she used all this sum except $3,200, with which she bought sixteen shares of the capital stock of the Citizens National Bank of Hendersonville, at $200 a share, issued in her name.

At the time of his death S. V. Pickens owned sixteen shares of the capital stock of this bank, and Mrs. Pickens as executrix caused these shares to be transferred from his name to hers on 13 December, 1921. The estate of S. V. Pickens has no other personal property.

Cornelia S. Pickens died 7 January, 1928, leaving a will in which the defendants were named as her executors. They qualified on 10 January, 1928. In her will she devised and bequeathed real and personal property. The plaintiff qualified as administratrix *c. t. a.* of S. V. Pickens on 14 November, 1928, and was appointed commissioner on 19 January, 1929, pursuant to a provision in the fourth item of his will. The fourth and fifth paragraphs of his will are as follows:

"4th. I hereby give and bequeath unto my dear wife, Cornelia S. Pickens, for her natural life all my personal property of whatsoever kind, not specifically and otherwise disposed of in this will, either hereinbefore or hereafter; to be used and disposed of by her as she may see fit during life, but whatever of this said personal property bequest, the proceeds thereof & of the cash hereinafter specifically given her, on hand at her death and the proceeds of the same not disposed of by her before death, shall be collected and sold for cash by a commissioner appointed by the Superior Court of Henderson County without unnecessary delay and after payment of the necessary expenses pay the balance one-half to the heirs of my said present wife and one-half to the heirs of my sisters Rachel Wild and Elizabeth Wild—both dead—½ to each set.

"5th. I also give and bequeath to my dear wife, Cornelia S. Pickens, of the cash on hand and in the banks the sum of eight thousand dollars to include the bal of $1,000 due on the Hurt mortgage and note in which she is named as a party and as a survivor owns it. The cost of stone for grave to be credited on this bequest to her. She my said wife, Cornelia S. Pickens accepts the gifts, bequests &tc. contained in this will with all its conditions in lieu of and in full satisfaction of dower and all other claims by reason of our relation as man and wife not specified."

The plaintiff contends that the bank stock belongs to the estate of S. V. Pickens and the defendants contend that it belongs to the estate of Cornelia S. Pickens. Judge MacRae held that the plaintiff in her capacity as executrix and commissioner is the owner of the thirty-two shares of the capital stock of the Citizens National Bank of Hendersonville and is entitled to recover them from the defendants. The defendants excepted and appealed.

Shipman & Arledge for plaintiff.
G. H. Valentine for defendants.

ADAMS, J. The ultimate question is whether the title to the thirty-two shares of stock in the Citizens National Bank of Hendersonville is in the plaintiff as the representative of S. V. Pickens or in the defendants as the representatives of his wife. The answer depends upon the interpretation of the testator's will and the legal significance of the certificates of deposit.

The bank certified that S. V. Pickens had deposited the money and that it was "payable to the order of self or Cornelia S. Pickens, his wife." The defendants say (1) that in effect the deposits were made in the names of both the husband and the wife, were payable to either, and upon the death of the husband were payable to the wife without regard to any provision in the husband's will; or (2) if this position is unsound, that the word "or" should be construed to mean "and," thereby giving to the wife a one-half interest in all the deposits.

The appellants cite C. S., 230 as supporting their first contention; but this section applies only when the deposit is made "in the names of two persons, payable to either, or payable to either or the survivor." The certificates show that the deposits were made, not in the names of two persons, but in the name of S. V. Pickens only. Of more direct interest to the appellants is the question whether the subsequent clause in the certificates converts the deposits into a gift, in whole or in part, to the depositor's wife. S. V. Pickens having made the deposit in his own name is presumed in the absence of contradictory or inconsistent evidence to be the owner of the money. It remained his unless his wife obtained title to it or to a part of it by trust, gift, or bequest. It is not contended that a trust was created, but that the depositor intended the certificates, treated independently of his will, as a gift *inter vivos* to his wife.

In the cases relating to this subject there is a distinction between those in which the account was opened or placed in the names of the depositor and another and those in which a person other than the original owner was merely authorized to draw on the deposit. Cases discussing the effect of a joint deposit in the names of the original owner and another generally refer to those who open an account on the books of the bank as joint tenants or tenants in common of the fund. An interesting collection of decisions on this subject appears in the annotation subjoined to *Parrish v. Merchants & M. Sav. Bank,* L. R. A., 1917 C, 548, 550. In our case these decisions are not controlling for the reason that the deposit was made in the name of only one person—S. V. Pickens. The second class is illustrated by cases adhering to the principle enunciated in 3 R. C. L., 579: "Where a certificate of deposit is issued payable to the order of the depositor or his wife, it seems that after the depositor's death the wife cannot demand payment of the deposit upon a return of the certificate. The reason for this is that the title to the deposit is in the depositor, and the only right which the wife has to draw out the money is under the authority conferred upon her by her husband, she acting as his agent. Her power being that of an agent merely, it is revoked by the death of her husband."

The principle was upheld many years ago by the Court of Appeals of Maryland in *Murray v. Cannon, Admrx.,* 41 Md., 466. There the entry on the books of the bank and in the book of deposit was as follows: "James Cannon, subject to his order, or to the order of Mary E. Cannon." Mary E. Cannon, the depositor's daughter, who afterwards became the wife of a Mr. Murray, claimed the money on deposit. She had acquired possession of the deposit book during the lifetime of James Cannon, and she contended that the entry in the books was evidence of her title. The Court, disapproving her position, used this language: "To perfect a gift, the delivery of a thing intended to be given is indispensable. 'There must be a parting by the donor with the legal power and dominion over it. If he retains the dominion, if there remains to him a *locus penitentiæ,* . . . there cannot be a perfect and legal donation, and that which is not a good and valid gift in law cannot be made good in equity.' *Patterson's Admr. v. Gittings' Exr.,* 2 G. & J., 217; *Nickerson v. Nickerson,* 28 Md., 327. The money in question was deposited in the Savings Bank to the credit of James Cannon, and so continued up to the time of his death. He retained dominion and control over it by the very terms of the account with the bank, and could at any time have drawn it out, or revoked the power given to Mary E. Cannon to obtain it upon her own order. If she had drawn out any portion of the money, she would have drawn it out as the money of James Cannon, acting in the matter as his agent, and by virtue of a then existing authority derived from him. This agency was revoked by his death, *Carey v. Dennis,* 13 Md., 18, and the bank properly refused to recognize it after that period."

The same conclusion was reached in *Second National Bank of Baltimore v. Wrightson, Ex'r,* 63 Md., 81. The certificate introduced in that case showed that Samuel Stines had deposited in the bank $1,000, payable to the order of himself or Ellen Stines, his wife, on the return of the certificate. It was adjudged that the certificate did not authorize the payment of the money to Ellen Stines after the death of Samuel Stines. The principle has been applied in other cases. *Lufkin v. Lufkin,* 90 Atl. (Me.), 493; *Wayne County and Home Sav. Bank v. Smith,* 160 N. W. (Mich.), 472.

The certificate was not a gift *inter vivos* of the deposit to Cornelia S. Pickens. "To constitute a gift of a bank deposit there must be an intention to give and the consummation of an intention by a delivery of, and a loss of dominion over, the property given." 30 C. J., 701, sec. 297. So far as the record discloses S. V. Pickens never abandoned control of the deposit or parted with the certificates. He appointed his wife as his agent to withdraw the money on return of the certificate properly endorsed. The agency, which was not exercised in his lifetime, was revoked by his death. It follows that the agency cannot be converted into a tenancy in common by transforming the word "or" into "and," as contended by the appellant. *Smith v. Smith,* 190 N. C., 764, is therefore not in point.

It is contended by the appellants that without regard to the certificates, Mrs. Pickens acquired title to the personal property and the money described in the fourth and fifth paragraphs of the will because her husband bequeathed the property and the money with absolute power of disposition and that such bequest imports absolute ownership. This is denied by the plaintiff, who contends that Mrs. Pickens acquired only a life estate in the personal property, "not specifically and otherwise disposed of in the will." The accepted doctrine is this: "If an estate be given to a person generally or indefinitely, with a power of disposition, it carries a fee, unless the testator gives to the first taker an estate for life only, and annexes to it a power of disposition of the reversion. In that case the expressed limitation for life will control the operation of the power, and prevent it from enlarging the estate in fee." 4 Kent Com., 520, cited in *Chewning v. Mason,* 158 N. C., 578. This doctrine has been clearly stated in reference to both real and personal property in several of our decisions, among which are *Troy v. Troy,* 60 N. C., 624; *Chewning v. Mason, supra; Allen v. Smith,* 183 N. C., 222; *Roane v. Robinson,* 189 N. C., 628. See, also, *Roberts v. Saunders,* 192 N. C., 191. In *Long v. Waldraven,* 113 N. C., 337, the following clause in the will of John B. Doub was contested: "It is my will that after the death of my wife my estate shall be equally divided between the heirs of my brothers and sisters with the exception of one-third of my estate which I leave at the disposal of my wife to be left as she may will." The Court held that the testator's widow took a life estate in all the personalty with the power of disposing of one-third of it during her life, and that as she failed to make such disposition the personal property went to the heirs of the testator's brothers and sisters.

The fourth paragraph of testator's will gives to Mrs. Pickens for her natural life all his personal property not otherwise disposed of by preceding or subsequent clauses, to be used and disposed of by her during her life as she saw fit. But there was a direction that the proceeds of the personal property and of the cash referred to in paragraph 5 "not disposed of by her during her life" should be collected and sold for cash by a commissioner appointed by the court. We think it obvious that the testator thereby intended to give to his wife only a life estate in the personal property and in the cash described in paragraphs four and five of the will.

The appellants say in the next place that the power conferred upon Mrs. Pickens to dispose of these articles was exercised by her testamentary disposition of the property. This position is inconsistent with the direction in the fourth paragraph of her husband's will. The direction is that the personal property therein described not disposed of by her before her death shall be sold, and the cash referred to in the fifth paragraph not disposed of by her before her death shall be collected. The exercise of the power by the instrumentality of her will is thus expressly precluded. The judgment is

Affirmed.

M. E. GRUBER, INC., AND M. E. GRUBER v. E. W. EUBANK, TRUSTEE ET AL.

(Filed 22 May, 1929.)

1. **Deeds and Conveyances C d—Reservation in deed in this case held too vague to allow parol evidence of identification, and is void.**

   A reservation in a deed in the chain of title to the *locus in quo*, contained in the description "thence south 5 degs. east, running on the west side of the creek 7 poles to a stake on the west side of the creek; thence same course 1 pole to a stake, reserving at all times the full and entire use of the distance of 40 yards of said creek" is held too vague and indefinite a description to admit of identification by parol evidence, and is not contrary to a covenant in a later deed against encumbrance.

2. **Easements A a—Intermittent and permissive use of paths on land does not create easement thereon.**

   Evidence that paths on a tract of land were intermittently and permissively used by tourists and others is insufficient to create an easement on the lands.

CLARKSON, J., not sitting.

CIVIL ACTION, before *Schenck, J.*, at November Term, 1928, of HENDERSON.

On 15 October, 1836, Charles Baring executed and delivered a deed to Marie Joseph Gabriel Xaviar DeChoisel for a large body of land covering the land in controversy. The said deed shows the following reservation: "Thence south 5 degs. east, running on the west side of the creek 7 poles to a stake on the west side of the creek; thence same course 1 pole to a stake, reserving at all times the full and entire use of the distance of 40 yards of said creek for the use of my Flat Rock settlement and that it may not be directed (diverted) from the same." It is contended that this language created the Jerusalem Trail, situated in some places about 40 yards from the creek and running across plaintiff's land for a distance of approximately one-third of a mile.

The land by mesne conveyances became the property of R. C. Seigling. On 11 January, 1926, R. C. Seigling and wife conveyed to M. E. Gruber a part of said land, containing 112 acres, more or less, without reservation. Gruber executed a deed of trust to the defendant, Eubank, to secure the payment of purchase money notes amounting to approximately $100,000. The entire purchase price was $150,000. The title to the property was investigated and an abstract thereof furnished to Gruber at the time of the purchase. In the meantime Seigling died and his wife, Lucile L. Seigling, qualified as executrix of his will. At the time the first note fell due Gruber procured an extension of time from Mrs. Seigling. Payment not having been made according to contract, the defendant, Eubank, under power contained in the deed of trust, advertised the property for sale. Thereupon the plaintiffs secured a restraining order, alleging in substance that they had agreed to pay $150,000 for said property for the reason that he was desirous of acquiring a private estate which was excluded from highways and traffic, and thus protected from intrusion of outsiders. Plaintiffs further alleged that the language in the deed from Baring to DeChoisel and subsequent conveyances of said land constituted an easement upon their land, which said easement was an encumbrance upon the title and greatly depreciated the value of their property, for that the public had the right to pass across the land.

The evidence tended to show that there was a walkway of some kind known as the Jerusalem Trail, which was located across plaintiff's land on the west side of the creek, and running from the Little River road on the west side of the creek until it strikes Idlewild Drive. At this point the trail forks and one part turns east and runs along said drive, and the other continues in the direction of a church known as St. John's in the Wilderness. This walkway or trail appeared to be forty yards wide and situated about one hundred and twenty feet west of the creek at some points, although at other points it was more than one hundred and twenty feet west of the creek. The trail had been obliterated in some places, and at other places it was fairly plain. There was evidence tending to show that a cow pasture and a hog pasture had been built across this trail, but that there were gates or stiles in the fence many years ago. "In spots the trail is grown up in blackberry sprouts, timber and things like that pretty thick. . . . The trail stops near a wire fence, and you go into a field after it leaves the Gruber land. . . . There is a field all plowed and cultivated part of the way, and there is no indication of a trail. . . . I went on the west side of the creek to locate a 40-yard strip because about forty years ago I saw a stile across the fence, and old people said it was where Jerusalem Trail was." There was evidence that from time to time within the past twenty years people had been seen on the land, and perhaps in some part of this trail where it had not been obliterated. The field, referred to by the witnesses, was cleared and put into cultivation about sixteen or seventeen years ago. The entire tract was under fence about forty years ago. One witness for plaintiff testified as follows: "There were paths all over that place, and people would travel them pretty generally as they wanted to. They went into the Jerusalem path more than others. It seemed it was a more public way. It was more in the way of travel." Another witness testified: "My first acquaintance with that trail was about four years after the Civil War. Have traveled over that trail and have seen other people travel over it. The people used it when they wanted to. It was a public passway. I saw the Memmingers and Middletons going through there. . . . Bard Middleton owned it when I first knew it. The C. G. Memminger place . . . is right over on the other side of the Little River road. . . . The time I knew of those people going through there was about the time of the Civil War. . . . There has been a fence around the whole place, the Seigling place, for the last thirty or forty years."

Another witness for plaintiff testified he worked on the place from 1907 to 1912, and that he would see people walk through there, and that Mrs. Seigling said to let anybody go through the place if they did not molest anything. He further testified: "There were other paths going through the property in addition to the Jerusalem Trail. People used those trails like that and this Jerusalem Trail They used them when they wanted to make a short cut. . . . There never was much travel through there. The only thing was that people just took advantage of the place and went through when they wanted to go through just like they did any other place. . . . Those plantations are large, and most of the people who walk through there were Southern people. They were just there in the summer time. It was mostly summer people and boarders up here that went there."

Another witness testified: "People generally have been passing through the Jerusalem Trail for twenty-five years at least. . . . There are paths all through that place." Mr. Seigling "told me just to let them go anywhere through those paths as long as they did not interfere with or destroy the shrubbery." Mr. Seigling put the stiles there "for his men only." "Lots of people go through there, and some people go through that other path on the Seigling place."

The evidence further tended to show that the Flat Rock settlement was situated on the east side of the creek and that the line dividing the two tracts of land struck the elbow in the creek, crossing the creek at the elbow. This elbow constituted just forty yards of the creek, and the defendant contended that the language in the deed referred to was intended to reserve this bend in the creek for watering purposes for the

Flat Rock settlement because this elbow was the only portion of the creek east of the dividing line of the two tracts. The defendant further contended that this theory is borne out by the fact that the words in the deed, constituting the alleged reservation, occur immediately after the call for a stake on the west side of the creek, thus emphasizing the intention of the parties to reserve a part of the creek itself rather than a strip of land forty feet wide and one-third of a mile long on the west side of the creek.

At the conclusion of the testimony the trial judge sustained the motion of nonsuit, and the plaintiff appealed.

Arledge, Taylor & Crowell for plaintiffs.

Buist & Buist, Ewbank, Whitmire & Weeks and Rollings & Smathers for defendants.

BROGDEN, J. Two questions are presented by the record:

1. Does the language in the deeds, constituting plaintiff's chain of title, create an easement across the said land known as the Jerusalem Trail?

2. If not, has such easement to said strip of land, known as the Jerusalem Trail, been acquired by prescription?

It must be observed at the outset that no person or group of persons is claiming an easement across plaintiff's land or attempting to assert any right to use that strip of land described in the case as the Jerusalem Trail. The plaintiff has brought this suit against the defendants, alleging that the language in the deed constitutes an easement, which is an encumbrance upon his title, and therefore resulting in a breach of the covenant in the deed from the defendant to the plaintiff, and thus entitling the plaintiff to a rescission of the contract for the purchase of the land or for damages. The language of the deed creating the alleged easement occurs in the description of the property and is as follows: "Thence south 5 degs. east, running on the west side of the creek 7 poles to a stake on the west side of the creek; thence same course 1 pole to a stake, reserving at all times the full and entire use of the distance of 40 yards of said creek for the use of my Flat Rock settlement, and that it may not be directed (diverted) from the same." This language is found in the deed from Baring to DeChoisel and in every deed constituting the chain of title under which Seigling claims, though it is not inserted in the deed from Seigling to the plaintiffs. Baring, at the date of the deed in 1836, owned a large boundary of land. An examination of the description of the property from Baring to DeChoisel discloses that the reservation occurs as a part of the description of the land. It further appears from plats filed in the cause that the line of the land conveyed by Baring to DeChoisel was entirely on the east side of the creek and only touched the creek at the elbow. This elbow of forty yards, therefore, was the only part of the creek left on the Flat Rock side of the creek. In other words, a person living or owning land on the Flat Rock side of the creek would only touch the creek at the elbow without trespassing upon the DeChoisel land, which is now the land in controversy.

The law recognizes nine methods of creating or establishing easements. Mordecai Law Lectures, Vol. 1, 464-471. However, in the case at bar the easement in controversy arises either from the reservation in the deed or by prescription. An easement, of course, is an interest in land, and, if it is created by deed, either by express grant or by reservation, the description thereof must not be too uncertain, vague and indefinite. *Waugh v. Richardson*, 30 N. C., 470; *McCormick v. Monroe*, 46 N. C., 13; *Patton v. Educational Co.*, 101 N. C., 408, 8 S. E., 140; *S. v. Suttle*, 115 N. C., 784, 20 S. E., 725. See, also, *Bissette v. Strickland*, 191 N. C., 260, 131 S. E., 655, and *Bryson v. McCoy*, 194 N. C., 91, 138 S. E., 420; *Coastal Land and Timber Co. v. Eubank*, 196 N. C., 724.

The principles of law relating to easements are clear enough and plain enough, but the chief difficulty arises in construing or interpreting the language contained in the deed. A reservation of "a distance of 40 yards of said creek . . . and that it may not be diverted from the same" is too ambiguous and uncertain to create a public way for one-third of a mile across a tract of land. The identity of such an interest in land would of necesssity rest in conjecture and speculation, and we therefore hold that the language in the deed was not sufficient to identify the easement asserted by the plaintiff.

The second phase of the controversy involves the question as to whether the Jerusalem Trail by virtue of use amounted to a public way across the lands of the plaintiff. There is evidence in the record of the existence of the Jerusalem Trail about forty or forty-five years ago. There is further evidence that within the past ten years people have been seen walking in portions of this trail, and that in former years numbers of people used the walkway for going to church or for other purposes. However, it further appears that forty years ago the entire tract of land was under fence, and that subsequently a cow pasture and a hog pasture enclosed by a wire fence had been constructed across this area, and that while stiles had been erected, they had been built for the exclusive use of employees of the owner. Indeed, the testimony discloses that summer boarders and sightseers were the persons most frequently seen upon the premises in recent years.

Mere user is not sufficient to create such an easement as contended for by the plaintiffs. *Boyden v. Achenbach,* 79 N. C., 539; *Snowden v. Bell,* 159 N. C., 497, 75 S. E., 721; *S. v. Norris,* 174 N. C., 808, 93 S. E., 950; *Nash v. Shute,* 184 N. C., 383, 114 S. E., 470. The legal essentials for creating an easement by prescription are thus stated in 9 R. C. L., 772: "To establish an easement by prescription it must be: first, continued and uninterrupted use or enjoyment; second, identity of the thing enjoyed; third, a claim of right adverse to the owner of the soil, known to and acquiesced in by him." *Draper v. Conner,* 187 N. C., 18, 121 S. E., 29; *Durham v. Wright,* 190 N. C., 568, 130 S. E., 161.

The evidence in the case at bar, viewed in a light most favorable to the plaintiffs, tends to show intermittent and desultory use of portions of that strip of land known as the Jerusalem Trail. There is no suggestion of any claim of right by any person or group of persons. In the last analysis it appears that neighbors, sightseers and summer boarders from time to time walked in this trail at places where it was not enclosed by fence or grown up in bushes and timber or obliterated by cultivation. There is no evidence tending to establish the existence of such an easement, and the judgment of nonsuit was properly entered.

Affirmed.

CLARKSON, J., not sitting.

STATE v. BILL DANIELS.

(Filed 22 May, 1929.)

1. **Criminal Law H a—Where time to employ and consult counsel and subpoena witnesses is not demanded by defendant he waives right thereto.**

   Where a trial of the defendant for violating the prohibition law is had within thirty or forty minutes from the time of his arrest, in the regular course of procedure, and the defendant does not demand time to employ and consult counsel or subpœna witnesses he waives any right thereto, and a sentence in the action will be sustained in law.

2. **Criminal Law K d—Sentence prescribed by statute for violation of prohibition law is not cruel or unusual punishment.**

   A sentence prescribed by statute for the violation of the prohibition law is held not to be cruel or unusual within the meaning of Article I, section 14, of our Constitution.

APPEAL by defendant from *Schenck, J.,* at February Term, 1929, of MADISON. No error.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

Robert R. Reynolds and W. A. Sullivan for defendant.

PER CURIAM. The defendant was indicted for a breach of the prohibition laws. The State's evidence tended to show that after the defendant's car had been overtaken and stopped by an officer three seats were removed and three cases of whiskey (21 gallons) were found under quilts, and that farther back under the seat were 2½ gallons of liquor in half-gallon fruit jars. The defendant was the driver of the car. Immediately after his arrest he was taken to the courthouse; an indictment was prepared and returned as "a true bill"; the case was then called in less than an hour after the arrest and the defendant pleaded guilty. He made no motion for a continuance or for time to employ and confer with counsel or for a subpœna for witnesses. Time to employ counsel or to get witnesses was not denied the defendant by the court, but was waived by the defendant when he entered his plea and admitted his guilt. In the absence of a motion for a reasonable continuance an exception to the short time intervening between the arrest and the arraignment does not constitute sufficient cause for a new trial.

The third assignment of error is that the sentence was excessive, but as it was authorized by the law it cannot be held to be "cruel or unusual" within the contemplation of Art. I, sec. 14, of the Constitution. *S. v. Manuel*, 20 N. C., 144; *S. v. Pettie*, 80 N. C., 367; *S. v. Farrington*, 141 N. C., 844; *S. v. Dowdy*, 145 N. C., 432.

No error.

SHUFORD PEELER v. UNITED STATES CASUALTY COMPANY.

(Filed 29 May, 1929.)

1. **Insurance J d—Condition in accident policy requiring notice to company of accident and claim for damages is material.**

   Where a policy of automobile accident insurance contains the condition that the insured shall give immediate notice to the insurer of accidents and claims for damages, the condition is material, affording the insurer opportunity to gather the facts for its protection when fresh in the minds of witnesses, etc., and is a condition precedent to the right of recovery by the insured.

2. **Same—Breach of condition requiring notice forfeits policy.**

   The failure by the insured to give the insurer notice of an accident and claim for damages by the person injured required by a condition in the automobile accident policy will make the policy void without an express forfeiture clause in the policy to that effect.

3. **Insurance R b—Person injured by insured is in same position in regard to insurer's liability as insured.**

One who is injured by the insured in an automobile accident covered by the policy of accident insurance, and sues the insurer under the provisions of the policy providing therefor upon return of execution against the insured unsatisfied, the injured person is in the same position with reference to the insurer's liability as the person insured, and is bound by a provision of the policy requiring the insured to give notice of accidents and claims for damages, and where the insured has forfeited the policy by a breach of this condition, the person injured may not recover thereon.

APPEAL by defendant from *Stack, J.*, at February Term, 1929, of MECKLENBURG. Reversed.

In 1926 a collision occurred between the plaintiff's car and one owned by F. K. Graham. Graham brought suit against the plaintiff and the plaintiff answered, denying liability and setting up a cross-action against Graham. At the December Term, 1927, of the Superior Court of Mecklenburg County the plaintiff recovered a judgment against F. K. Graham in the sum of $525 as damages to the plaintiff's automobile caused by the collision. An execution was issued on this judgment and was returned unsatisfied. At the time of the collision Graham had a policy or contract of insurance issued by the defendant, known as "The Automobile Public Liability and Property Damage Insurance Policy." The plaintiff was not a party to the contract. It is admitted that the defendant never had written notice of the collision and knew nothing about it until the trial between the plaintiff and Graham had begun, and then disclaimed liability for the reason that Graham had failed to give the notice required by the policy. The amount of the policy is in excess of the plaintiff's judgment against Graham. The collision of the plaintiff's car with Graham's occurred on 1 May, 1926. Graham brought suit against the plaintiff on 25 September, 1926, and the plaintiff set up a cross-action and recovered judgment against him at December Term, 1927, as above stated. The present action was brought 16 April, 1928.

The verdict was as follows:

What amount, if any, is the plaintiff entitled to recover against the defendant? Answer: $525, with interest thereon from 15 December, 1927, and the further sum of $57.25 costs in action of "Graham *v.* Peeler."

Judgment for plaintiff and appeal by the defendant upon error assigned.

J. D. McCall for plaintiff.

J. Lawrence Jones for defendant.

ADAMS, J. The defendant issued its policy insuring F. K. Graham as respects legal liability arising or resulting from any claim made upon him for damages in consequence of an accident occurring by reason of his ownership, maintenance, or use of an automobile. The policy contains the following provisions:

"Item 3. The company will defend, in the name and on behalf of the assured, all claims or suits for damages for which the assured is alleged to be legally liable and will pay within the limits covered by this policy, any final judgment rendered against said assured for damages, together with the taxed court costs and accrued interest and such other expenses as may have been incurred with the company's written consent.

"Condition C. Upon the occurrence of an accident for which insurance is provided herein written notice must be given to the company by the assured as soon as practicable with the fullest particulars available. If a claim is made on account of such accident or if a suit is brought thereon, all information and every summons, process or pleading must be immediately transmitted to the company. The assured shall not voluntarily assume any liability nor incur any expense other than for immediate surgical relief nor settle any claim except at the assured's own cost, nor interfere in any negotiation for settlement nor in any legal proceedings, but whenever requested by the company and at the company's expense the assured shall aid in information and evidence and the attendance of witnesses and shall coöperate with the company (excepting in a pecuniary way) in all matters which the company deems necessary in any investigation, defense or appeal under this policy.

"Condition D. In the event of the bankruptcy or insolvency of the assured, the company shall not be released from the payment of such indemnity hereunder as would have been payable but for such bankruptcy or insolvency. If, because of such bankruptcy or insolvency an execution against this assured is returned unsatisfied in an action brought by the injured, or by another person claiming by, through or under the injured, then an action may be maintained by the injured or by such other person against the company under the terms of this policy for the amount of the judgment in said action, not exceeding the amount of this policy."

The trial judge held as a matter of law that Graham's failure to give the defendant written notice of the accident could not affect the plaintiff's right of recovery, and instructed the jury if they believed the evidence to answer the issue for the plaintiff. To this instruction the defendant excepted.

The appeal presents two questions: (1) Under the terms of the policy could F. K. Graham, the assured, have maintained an action against the defendant for damages caused by the collision without giving the written notice provided for in Condition C? (2) If not, can an action against the defendant be maintained by the plaintiff for damages to his car resulting from the collision?

These questions have been considered and answered in a number of authoritative decisions. A policy issued by the defendant containing the provision under consideration in the present case was construed by the Court of Appeals of Ohio in *U. S. Casualty Co. v. Breese,* 153 N. E. (Ohio), 206. The material facts in that case and in this are substantially the same: a motor bus came into collision with an automobile driven by Martha Breese resulting in damage to her person and to her car. She recovered judgment against the operator of the bus (Zurawski) and issued an execution which was returned unsatisfied. Zurawski had previously secured liability insurance of the United States Casualty Company, which was in force at the time of the alleged injury. Not having secured satisfaction of her judgment she brought suit against the Casualty Company, who pleaded as a defense the failure of the assured to give the written notice required in the contract of insurance. On appeal from the lower court the defense was sustained, the Court saying: "Condition B (Condition C, *supra)* becomes, then, an important part, and, indeed, the essence of the contract existing between the Casualty Company and Zurawski, and whatever rights the injured party, Martha Breese, may have, can only exist under and by virtue of the obligations cast upon the company by that policy, and can only be enforced in accordance with its limitations. In the absence of the policy she would have, of course, no right of recovery as against the company, and in view of the existence of the policy she has such right, and such right only, against the company, as is provided by the policy. The policy, in unequivocal terms, provides, as an essential condition of recovery, that the assured shall give immediate written notice to the company of an accident and shall forward to the company every process, pleading, and paper relating to the suit. These requirements are averred not to have been complied with by the assured. Similar language in liability insurance policies has been construed in decisions of various courts. Our Supreme Court had such a policy under consideration in *Traveler's Insurance Co. v. Myers & Co.,* 62 Ohio St., 529, 57 N. E., 458, 49 L. R. A., 760. In that case the corresponding stipulation of the policy read as follows: 'Immediate written notice shall be given this company of any accident and of all alleged injuries, together with copies of all statements made by employees, and all other information in possession or knowledge of the insured in any way relating to such accident or liability therefor.'

"In construing that provision, the Supreme Court, speaking through *Davis, J.*, used the following language: 'It is obvious that this stipulation is of the essence of the contract in insurance of this kind. It is not merely a stipulation as to the form of bringing to the notice of the insurer the fact of a loss, as in policies of fire and life insurance.'

"The Court, in further consideration of the provision, gave the reasons for the necessity of such a requirement as follows: 'In insurance of this character it is a matter of the first importance to the insurer, who may be forced to become the real defendant in a lawsuit against the insured employer, to be speedily informed of all the facts and witnesses concerning a possible litigation. In a very little time the facts may in a great measure fade out of memory, or become distorted, witnesses may go beyond reach, physical conditions may change, and, more dangerous than all, fraud and cupidity may have had opportunity to perfect their work. Therefore this stipulation is vital to the contract.'

"This decision as to the construction of such a provision in a policy of liability insurance was followed in *Employers' Liability Assurance Corp. v. Roehm,* 99 Ohio St., 343, 124 N. E., 223, 7 A. L. R., 182, where the condition was pronounced to be of the essence of the contract. In the face of these direct holdings of the Supreme Court, we do not feel at liberty to give any other construction to the terms of Condition B in the policy in the case at bar. A similar decision was rendered in the case of *Jefferson Realty Co. v. Employers' Liability Assurance Corp.,* 149 Ky., 741, the Court saying: "In the course of the opinion, on pages 747 and 748 (149 S. W., 1011), that it was wholly immaterial whether or not the company was prejudiced by the delay, and that a reasonable compliance with the conditions of the contract relating to notice was indispensable to fix liability. To the same effect is *Phœnix Cotton Oil Co. v. Royal Indemnity Co.,* 140 Tenn., 438, 205 S. W., 128. The Supreme Judicial Court of Massachusetts, in *Lorando v. Gethro,* 228 Mass., 181, 117 N. E., 185, 1 A. L. R., 1374, reached a similar conclusion."

In a case subsequently considered the Court of Appeals of Ohio adhered to the principle stated in *Breese's case (Stacey v. Fidelity and Casualty Co.,* 152 N. E., 794), and the decision was affirmed on appeal to the Supreme Court. *S. c.,* 151 N. E., 718.

The same conclusion was announced in *London, etc., Accident Co. v. Siwy,* 35 Ind. Appellate Court, 340; *Travelers' Ins. Co. v. Scott,* 218 S. W. (Tex.), 53; *McCarthy v. Rendle,* 230 Mass., 35; *Dennis Sheen Transfer v. Ga. Cas. Co.,* 113 So., 165.

In *Weatherwax v. Royal Indemnity Co.,* 165 N. E., 293, the Court of Appeals of New York said that the rule is settled that a judgment creditor enforcing the policy of a right to recover damages against an insurance company after the return of an unsatisfied execution against the insured debtor, stands in the shoes of the insured, and forfeits the insurance if there has been a breach of its conditions, citing *Coleman v. New Amsterdam Casualty Co.,* 247 N. Y., 271, 160 N. E., 367.

The provision requiring written notice is a condition precedent to the assured's right to recover damages, although it contains no express forfeiture clause. *London, etc., Accident Co. v. Siwy, supra.* So in *Foster v. The Fidelity & Cas. Co. of New York,* 99 Wis., 447, it is said: "The policy provides that immediate written notice must be given to the company of any accident and injury for which a claim is to be made, with full particulars thereof. This was a condition precedent to a recovery." And in *Underwood Veneer Co. v. London Guaranty & Accident Co.,* 100 Wis., 378, the reason is given as follows: "The reason for requiring such notice is obvious. It was to enable the defendant to investigate the facts and circumstances of the accident while they were fresh in mind, with the view of settling the loss in case it should be so advised, and, in case of a contest, to be prepared to defend the same as stipulated in the policy. Accordingly the plaintiff was thereby expressly precluded from settling any claim or incurring any expense, without the consent of the defendant, except in case of absolute necessity. These things made it important for the defendant to be notified immediately, not only of the occurrence of the accident, but also that a claim for damages had been made by the injured person on account of the accident. The words "and also," in the conditions quoted, pretty clearly indicate that such notice of the occurrence of the accident was to be followed by a further or additional notice of any claim made for damages, and each such notice was to be given immediately as therein required." See, also, *McCarthy v. Rendle, supra,* 38.

These decisions preclude the notion that the policy constitutes an independent contract between the plaintiff and the defendant, similar to contracts for fire insurance having the standard mortgage clause expressly authorized by statute for the protection of mortgagees. C. S., 6420; *Bank v. Ins. Co.,* 187 N. C., 97; *Everhart v. Ins. Co.,* 194 N. C., 494. The principle applicable in the case before us is more nearly assimilated to the principle stated in *Welch v. Wiggins,* 196 N. C., 546, in which it was held that under the clause there construed the mortgagees could not recover because the mortgagor was barred. It would be extravagant to hold that the plaintiff in this action, who is not a party to the contract between the defendant and Graham, acquired rights under the policy which are superior to Graham's and that the defendant is liable to him although it is not liable to the party with whom the contract was made. One who seeks to take advantage of a contract made for his benefit—if in any view the contract of insurance can be construed as made for the plaintiff's benefit—must take it subject to all legal defenses, such as the nonperformance of conditions. 13 C. J., 699, sec. 799. As the assured failed to comply with the contract, and as the plaintiff has no rights superior to those of the assured, the plaintiff cannot maintain his action. The motion for nonsuit should have been allowed. The judgment must, therefore, be

Reversed.

JEFFREY F. STANBACK AND ROE ELLA WOODARD v. CITIZENS NATIONAL BANK OF RALEIGH, TRUSTEE.

(Filed 29 May, 1929.)

1. **Trusts D a—Trustor may revoke voluntary trust of personal property.**

   A trust estate in personalty created by the donor in consideration of one dollar and natural love and affection is a voluntary trust and may be revoked by the donor of the trust under the provisions of C. S., 996, as amended.

2. **Same—Power of revocation not affected by contingent interests under trust.**

   Where a voluntary trust is created in the stock of a bank for the life of the donor or until he reach the age of fifty years, and at the termination to his issue or in the absence of issue to his next of kin under the statute of distributions, those who take in remainder take upon a contingency, the vesting of which depends upon the uncertain happening of a future event, and the trust may be revoked by the donor under the provisions of C. S., 996.

3. **Statutes B d—Retroactive statute not affecting vested interests is Constitutional.**

   An *ex post facto* statute prohibited by the State Constitution, Art. I, sec. 32, relates only to criminal statutes, and though vested rights may not be affected by retroactive laws, contingent interests may be affected thereby, and where there is a voluntary trust estate with the limitation over upon a contingency determinable at some future time as to the persons who take thereunder, the power of revocation of the trust given by C. S., 996, is not objectionable as falling within the Constitutional inhibition.

APPEAL by defendant from *Midyette, J.*, at April Term, 1929, of WAKE. Affirmed.

Robert N. Simms and R. Gordon Finney for Jeffrey F. Stanback.
H. G. Connor, Jr., for Roe Ella Woodard.
Smith & Joyner for defendant.

ADAMS, J. This is a controversy without action, in which the plaintiffs seek to revoke a trust under C. S., 996, as amended by the act of 1929. Jeffrey F. Stanback is the son of Annice R. Stanback, deceased, and the nephew of his coplaintiff, Roe Ella Woodard. Annice R. Stanback left a will, by which, after bequeathing certain personal property and shares of stock, she devised the residue of her estate to the defendant as trustee for the uses and trusts declared and set forth in her will. The defendant is to manage and control the trust estate, to collect the income therefrom, and to pay the net income to Jeffrey F. Stanback. The trust is to terminate when Jeffrey F. Stanback arrives at the age of fifty years, or at his death if he does not reach that age. When the trust comes to an end the whole interest therein is to vest in Jeffrey F. Stanback if living; but if he dies under the age of fifty years the trust estate shall go to his issue, if any, *per stirpes,* and if there is no issue then to his next of kin under the statute of distributions. The trustee is directed, when the trust ceases, to divide and deliver the personal property and to convey the real estate, to the beneficiaries named in the will.

On 31 December, 1927, Mrs. Woodard, one of the plaintiffs, voluntarily and without value, but in consideration of her love for Jeffrey F. Stanback, executed a written instrument appointing the defendant a trustee to hold 260 shares of the capital stock of the defendant, owned by her and represented by certificate No. 705, upon the terms and conditions set up and declared in the will of Mrs. Annice R. Stanback. The instrument was signed and the trust accepted by the defendant. On 27 March, 1929, Mrs. Woodard signed and delivered to the defendant a written communication purporting to revoke the trust created on 31 December, 1927, so far as it affected or concerned the issue or the next of kin of Jeffrey F. Stanback; and at the same date Mrs. Woodard and Jeffrey F. Stanback signed and delivered to the defendant a written communication purporting jointly to revoke the former trust, and requested that the certificate for the 260 shares of stock be surrendered and that in lieu thereof two certificates of one hundred and thirty shares each be issued—one certificate to be delivered to Jeffrey F. Stanback as owner and the other to be held by the defendant in accordance with the terms of the trust. This communication was accompanied by a written instrument signed by Mrs. Woodard purporting to appoint the defendant a trustee of 130 shares of the capital stock of the defendant for uses and trusts substantially identical with those declared in the will of Mrs. Stanback. The defendant denied Mrs. Woodard's power to revoke the trust first created and insisted that the contingent interest therein could not be extinguished and that in order to protect this interest the trust must be preserved.

The trial judge held that the trust created by the instrument dated 31 December, 1927, had been revoked and the trustee discharged. He adjudged that the defendant surrender the certificate for the 260 shares of stock and issue two certificates of 130 shares each, one to be delivered to Jeffrey F. Stanback as owner, and the other to be held by the defendant upon the trusts declared in the instrument dated 27 March, 1929. Accordingly, judgment was rendered for the plaintiffs and the defendant appealed.

The maker's right to revoke a grant of future interests to persons not *in esse* was restricted by C. S., 996, to voluntary conveyances of some future interest in real estate. By an act ratified 19 March, 1929, the General Assembly amended this statute by adding the following: "The grantor, maker or trustor who has heretofore created or may hereafter create a voluntary trust estate in real or personal property for the use and benefit of himself or of any other person or persons *in esse* with a future contingent interest to some person or persons not *in esse* or not determined until the happening of a future event may at any time, prior to the happening of the contingency vesting the future estates, revoke the grant of the interest to such person or persons not *in esse* or not determined by a proper instrument to that effect: *Provided,* that in the event the instrument creating such estate has been recorded, then the deed of revocation of such estate shall be likewise recorded before it becomes effective."

Two questions are presented: 1. Did the amended statute authorize Mrs. Woodard to revoke the trust she had created as to all interests except those of Jeffrey F. Stanback? This involves the two subordinate questions whether (a) the trust was voluntary and whether (b) it limited future contingent interests to some person or persons not *in esse* or not determined. 2. Was the statute enacted in breach of the Constitution?

There can be no serious doubt that the trust was voluntary within the meaning of the statute. Indeed, it seems to have been so regarded by the parties themselves, for in the agreed statement of facts it is said that the paper creating the trust was executed by Mrs. Woodard "without any valuable consideration and voluntarily." It recites a consideration of one dollar and the grantor's love and affection for her nephew; but it recites also the grantor's desire to make a gift of the property. The recited consideration is not "valuable," that is, not "founded in motives of justice"; but it is "good"—founded on a motive of generosity and therefore merely voluntary or gratuitous and without valuable consideration. 2 Bl., 297. It is perfectly evident that the trustor received no consideration for the "gift"—the recital of the inconsequential sum of one dollar being a mere matter of customary form. *Allen v. Overton*, 94 So., 477; *Hopkins v. White*, 128 Pac., 780; *Oswald v. Nehls*, 84 N. E., 619; *Gentry v. Field*, 45 S. W., 286. See concurring opinion of *Ruffin, C. J.*, in *O'Daniel v. Crawford*, 15 N. C., 208.

All the interests except those of Jeffrey F. Stanback are both future and contingent. He has no children. If he does not become the absolute owner of the trust estate, the title will vest in his issue, if any, and, if there is no issue, in such of his next of kin as may be entitled thereto under the statute of distributions in force at the time of his death. These contingent interests, therefore, are embraced in the terms of the statute.

The trust was declared in 1927; the amendment became effective in March, 1929. The appellant insists that the statute is invalid because retroactive and destructive of interests created anterior to its enactment. C. S., 996, before it was amended by the act of 1929, did not purport to be retroactive; the subject-matter was the right to revoke a voluntary conveyance of some future interest in land conveyed or limited to a person not *in esse*. In *Roe v. Journegan*, 175 N. C., 261, it was held that section 996 did not affect deeds executed before its enactment. That was an action to recover land. The plaintiffs claimed title under a deed executed by their grandfather to his son in 1881; the defendant claimed under a deed from the same grantor to the same grantee made in 1886, and under a deed from the grantee to the defendant. The first deed conveyed title to the son during his natural life; if he should have any children, then to them, if not, the land was to revert; if his wife survived him she was to have a life estate. The wife died without issue; the son, her surviving husband, married again and died leaving children. The second deed was in fee simple. The real controversy was as to the delivery of the first deed; but it was decided that if this deed had been delivered, the plaintiffs, although not *in esse* at the time, were the owners of the land by reason of the conveyance of a life estate to their father with a contingent remainder, and that the deed of 1886 could not affect their title. It had been executed prior to the enactment of section 996 and the title, having passed, could not be recalled.

This case is not decisive of the question before us. As originally enacted, section 996 applied only to voluntary conveyances; as amended it includes the creation of voluntary trusts in real or personal property, not only for the benefit of the grantor, maker or trustor, and of persons not *in esse*, but for the benefit of persons determinable upon the happening of a future event. Furthermore, as amended, it applies to trusts heretofore created as well as to such as may be created hereafter.

The amended statute has no reference to crimes and is therefore not *ex post facto.* Constitution, Art. I, sec. 32. *Tabor v. Ward,* 83 N. C., 291; *Calder v. Bull,* 3 Dallas, 386, 1 Law Ed., 648. But there is no provision in the State or Federal Constitution which prohibits the passage of retroactive laws, as distinguished from those that are *ex post facto,* unless they are such as impair the obligation of contracts or disturb rights. *Tabor v. Ward, supra; S. v. Bond,* 49 N. C., 9; *S. v. Bell,* 61 N. C., 76; *Hinton v. Hinton, ibid.,* 410. We do not see how the statute disturbs any vested rights. The term "vested rights" relates to property rights, and "a mere expectancy of future benefit, or a contingent interest in property founded on anticipated continuance of existing laws does not constitute a vested right. Contingent rights arising prior to the enactment of a statute, and inchoate rights which have not been acted on are subject to legislative control." 12 C. J., 955. "The power that authorizes or proposes to give may always revoke before an interest is perfected in the donee." *Anderson v. Wilkins,* 142 N. C., 154. The judgment is

Affirmed.

FRICK COMPANY ET AL. v. D. G. SHELTON ET AL.

(Filed 29 May, 1929.)

Damages F b—Measure of damages for breach of warranty in sales contract.

Where the buyer, damaged by the fraud of the seller in the sale of machinery, elects to keep the machinery and recoup the damages in the seller's action for the purchase price, the measure of damages, in the absence of proof of special loss brought home to the knowledge of the seller, is the difference between the value of the machinery as warranted and its value as delivered, and an instruction for the recovery of further damages, consisting of the cost of supplying a deficiency, is reversible error in the absence of evidence that such was done.

APPEAL by plaintiff from *Moore, J.,* at September-October Term, 1928, of CLAY.

Civil action to recover on several promissory notes.

The plaintiff sold the defendants a Russell Engine, No. 16988, and certain mill equipment, and took in exchange therefor a Case Engine, No. 23202, and notes aggregating $800, secured by mortgage or deed of trust on said Russell Engine and other machinery.

Default having been made in the payment of said notes, plaintiff sues to recover the amount due thereon and to foreclose mortgage or deed of trust.

Defendants answered, denied liability and set up counterclaim for damages, alleging false and fraudulent representations on the part of plaintiff's agents in the sale of the Russell Engine.

From a verdict and judgment in favor of defendants, the plaintiff appeals, assigning errors.

Dillard & Hill and Thomas J. Hill for plaintiffs.
J. B. Grady and Moody & Moody for defendants.

STACY, C. J. The validity of the trial is assailed by numerous exceptions and assignments of error, but we shall not consider them *seriatim,* as it is necessary to award a new trial for error in the charge on the issue of damages.

Speaking to this issue, the court instructed the jury that if the defendants had been defrauded in the purchase of the Russell Engine, as they allege they were, the measure of damages "would be the difference in the value of the article represented and the article delivered, . . . plus the expense of what it would have cost to bring another engine and put it up."

There was no evidence that another engine was "brought and put up" in place of the Russell Engine, as the defendants continued to use the engine purchased from plaintiff after the discovery of the fraud, hence the cost of installing another engine in its stead, under the circumstances here disclosed, would seem to be an improper item in the admeasurement of the defendants' damages. *Robertson v. Halton,* 156 N. C., 215, 72 S. E., 316; *Marsh v. McPherson,* 105 U. S., 709.

A person who is defrauded in the purchase of an article of personal property has an election of remedies. *Van Gilder v. Bullen,* 159 N. C., 291, 74 S. E., 1059. One is, he may choose to retain the benefits of the contract, confirm its validity, and still recover damages for the fraud by which he was induced to make it, or he may recoup any damages which he has sustained if the opposite party sue him for money due on the contract, or other failure to perform it. *Pryor v. Foster,* 130 N. Y., 171.

When the injured party elects to affirm the contract and brings an action for deceit to recover such damages as the fraud has occasioned him, or sets up such damages by way of recoupment or counterclaim when sued upon the contract by the other party, in the absence of proof of special loss brought home to the knowledge of the vendor, the measure of damages is the difference between the value of the article as warranted and the value of the article as delivered. *Marsh v. McPherson, supra; Guano Co. v. Livestock Co.,* 168 N. C., 442, 84 S. E., 774.

True, this difference, under certain fact situations, may consist in the actual cost of supplying the deficiency, such as making repairs, removing liens, or whatever is necessary to make the article delivered equal in value to the article sold. But where nothing of the kind is done, or no effort is made to supply the deficiency, the difference, we apprehend, is to be ascertained by subtracting the value of the article as delivered from what its value would have been had it been as warranted, and this should not be augmented by other expense, *i. e.*, the cost of installing new machinery, which, perhaps, under a given state of facts, might have been considered as one of the items of difference, but was not incurred in the case at hand. *Robertson v. Halton, supra.*

For the error as indicated a new trial must be awarded; and it is so ordered.

New trial.

A. L. NEWBERRY ET AL. v. J. W. DRAUGHON ET AL.

(Filed 29 May, 1929.)

Mortgages H b—Foreclosure may not be enjoined on ground of usury.

An usurious charge of interest does not affect the validity of a mortgage, and an injunction against foreclosure will not be granted on the ground of usury.

APPEAL by defendants, R. L. Godwin, J. W. Draughon, and C. L. Wilson, from *Daniels, J.*, at November Term, 1928, of HARNETT.

Civil action for breach of warranty and to restrain foreclosure of mortgage and have the same removed as cloud on plaintiffs' title.

On 14 February, 1920, the plaintiffs purchased a lot of land from the defendants, J. W. Draughon and wife, Jaunita Draughon, and C. L. Wilson and wife, Ethel Wilson, taking deed therefor with full covenants of warranty, etc. This lot, previously owned by R. L. Godwin, had been mortgaged by him to secure his note of $1,500 given to Sallie Purdie. It is alleged by the defendants that the mortgage in question is not a valid encumbrance because it was given to secure a note bearing usurious interest, and that the same should be canceled of record. The mortgagee seeks to foreclose. The plaintiffs ask for injunctive relief and to have the mortgage canceled as a cloud on their title.

The court ruled that the mortgage was a valid encumbrance to the extent of the unpaid principal of the note plus interest at the legal rate, and ordered the mortgage foreclosed if the balance due on the note was not paid. The defendants, R. L. Godwin, J. W. Draughon, and C. L. Wilson, appeal, assigning error.

Smith & McLeod and Dye & Clark for plaintiffs.
I. R. Williams and J. C. Clifford for defendants.

PER CURIAM. The judgment must be affirmed on authority of *Miller v. Dunn,* 188 N. C., 397, 124 S. E., 746; *Waters v. Garris,* 188 N. C., 305, 124 S. E., 334, and *Briggs v. Bank, ante,* 120.

Affirmed.

J. R. LOWERY AND WIFE, S. C. LOWERY, v. GOLDSBORO LUMBER COMPANY.

(Filed 29 May, 1929.)

Deeds and Conveyances F a—Party may re-enter lands of grantor in timber deed to remove timber on other lands when right is given by deed.

Under a deed conveying such right the grantee of standing timber may reënter and construct and operate a tramway on the land of the grantor for the purpose of removing timber he had acquired from owners of other lands.

APPEAL by plaintiffs from *Daniels, J.,* at April Term, 1929, of JONES. Affirmed.

Controversy without action (C. S., 626), to determine the right of defendant to reënter upon a right of way over and across the land of plaintiff in Jones County, N. C., and to construct thereon a tramroad for the purpose of removing timber owned by defendant from lands other than the land of plaintiffs.

Upon consideration of the facts agreed and of the provisions of the deed from plaintiffs to defendant, it was ordered and adjudged that the defendant has the right to reënter upon said right of way and to construct thereon and use a tramroad for the purpose of removing timber from the lands of any and all persons.

From this judgment plaintiffs appealed to the Supreme Court.

McK. Carmichael for plaintiffs.
J. K. Warren and Warren & Warren for defendant.

PER CURIAM. Upon consideration of plaintiffs' assignments of error based on their exception to the judgment of the Superior Court, we conclude that same cannot be sustained.

The judgment is supported by the provisions of the deed from plaintiffs to defendant, dated 1 March, 1911.

After cutting and removing the timber from the land described in the deed, within the time stipulated therein, defendant took up and removed from the right of way which it located on said land, the tramroad which it had constructed for removing said timber. Under the judgment it has the right to reënter upon said right of way and to reconstruct thereon a tramroad to be used by it to remove timber from the lands of other persons who have conveyed same to defendant. This is in accordance with the provisions of plaintiffs' deed to defendant. The judgment is

Affirmed.

D. G. NOLAND v. CITY OF ASHEVILLE.

(Filed 29 May, 1929.)

Municipal Corporations G d—Statutory time limit for notice of appeal from street assessments is mandatory.

Where notice of appeal from the levying of assessments for street improvements had not been given by the property owner objecting thereto within the statutory time limit for the giving of such notice, the entry on the books of the city commissioners, made after the expiration of the statutory time limit, that the owner had appealed therefrom is not a waiver of the requirements of the statute in this respect.

APPEAL by plaintiff from *Sink, Special Judge,* at September Special Term, 1928, of BUNCOMBE. Affirmed.

Marcus Erwin for plaintiff.
George Pennell for defendant.

PER CURIAM. This was a motion to dismiss an appeal alleged to have been taken by the plaintiff from a final order of the defendant, a municipal corporation, assessing damages and benefits to property owned by the plaintiff resulting from the improvement of one of the streets of the city. The final order was made on 19 June, 1926, and the plaintiff's notice of appeal was given on 28 July, 1926. In the charter of the defendant it is provided that any owner of premises who is dissatisfied with the damages or with the amount of special benefits assessed against his property, or with any item in the report of the jury, may appeal to the next term of the Superior Court "by serving upon the adverse party a written notice of such appeal within ten days after said board of commissioners shall have so passed upon said report, but not afterwards." Private Laws 1923, ch. 16, sec. 297.

On 28 July, 1926, the board of commissioners of the defendant met in regular session and made this entry upon their minutes: "The appeal of D. G. Noland from the report of the jury assessing benefits and damages on account of the proposed widening of Vance Street was presented to the board, and on motion ordered filed and the clerk instructed to prepare and file the necessary papers in the office of the clerk of Superior Court."

The appellant contends that this is a waiver of the defendant's right to insist upon the ten-day limitation of the statute. The appellee contends that the statute is mandatory as to the time limit; that the commissioners are representatives, not of themselves as individuals, but of the whole city, and that the time within which an appeal may be taken was definitely fixed for the protection of all the citizens. Our opinion is that the statute prescribes a specific time within which an appellant from assessments in proceedings of this kind must give notice of appeal, and that the entry on the minutes of the commissioners did not have the effect of enlarging the time. The question of the right to apply to the Superior Court in proper cases for a writ to bring up an appeal after the time limited when the appellant is not in fault is not presented.

Affirmed.

T. J. FERGUSON, W. J. McCLURE, AND J. S. CONNOR, COUNTY COMMISSIONERS OF SWAIN COUNTY, AND S. R. PATTERSON, SHERIFF OF SWAIN COUNTY, v. W. C. MARTIN.

(Filed 12 June, 1929.)

1. Sheriffs A b—In this case held, sheriff was on salary basis and mandamus would lie to compel him to surrender tax books to his successor.

Where an act which says in its caption that its purpose is to regulate salaries, etc., repeals all former laws, and provides that the sheriff of a certain county should receive for his services as sheriff the fees of his office, and for his services as tax collector he should receive a certain sum per annum, payable monthly: *Held*, in the collection of taxes the sheriff was on a salary basis, and under the provisions of chapter 213, section 7, Public Laws 1927, he is required to turn over to his successor the tax books upon the termination of his term of office, and mandamus will lie to compel him to do so.

2. Sheriffs B a — Distinction between salary and fee basis of compensation.

The payment by the county for the services of a tax collector upon a salary or wage basis differs from that of a fee or commission basis in that in the former the payment for such services depends upon a period of time of service in such capacity, and in the latter, upon the particular acts of collection or value of the services rendered.

APPEAL by defendant from *McElroy, J.*, at March Term, 1929, of SWAIN. Affirmed.

The judgment of the court below is as follows: "This cause coming on to be heard at this, the March Term, 1929, of the Superior Court of Swain County before his Honor, P. A. McElroy, judge presiding, and the same being heard upon the plaintiff's motion for a mandamus to require the defendant to surrender and turn over the tax list, receipt books and other records and documents relative to the collection of 1929 taxes for Swain County, North Carolina, whereupon, upon consideration of the verified complaint and answer filed herein, and the several statutes and other proofs offered by the respective parties, the court finds the following facts, to wit:

1. That the defendant, W. C. Martin, was duly elected sheriff of Swain County at the regular November election, 1926, for a period of two years ending the first Monday in December, 1928, and that he served and acted as such sheriff until the first Monday in December, 1928, when he was succeeded in the office of the sheriff of said county by the plaintiff, S. R. Patterson, who was in like manner duly elected to said office on the 6th day of November, 1928.

2. That the defendant, W. C. Martin, received the tax list and books of said county for the year 1927 and served in said capacity, and that on the .... day of November, 1928, the board of commissioners of Swain County again delivered to the defendant, W. C. Martin, the list and tax books for the year 1928, and that the said defendant thereupon entered upon his duties as such tax collector, and that he still has in his possession the said tax list and receipt books for the taxes of said county of Swain for the year 1928, and duly filed his bond therefor, which bond was accepted and approved by the commissioners of said county.

3. That the plaintiff, S. R. Patterson, duly filed a bond with commissioners of said county as tax collector of Swain County for the year 1928, which bond was accepted and approved by the board of commissioners of said county.

4. That on 22 November, 1928, the plaintiff, board of county commissioners of Swain County, caused to be served on the defendant, W. C. Martin, by the plaintiff, S. R. Patterson, the present sheriff of Swain County, a notice or demand therein requiring the defendant, W. C. Martin, to surrender and turn over to the said commissioners the tax list, receipt books and other records and documents pertaining to the office of such tax collector of Swain County, and therewith file a statement of the amount of taxes collected by the said W. C. Martin between said date and the time said tax lists were so delivered to him. That

the said W. C. Martin refused to so turn over and surrender said list, tax records and documents, and still holds the same in his possession, as aforesaid, and still refuses to deliver and surrender the same to the plaintiffs.

5. That the said W. C. Martin was paid by the commissioners of said county for the collection of the taxes for 1927, as provided by law, the sum of $3,250, but has not been paid the full sum of $3,250 for the taxes of 1928; that his term of office as such tax collector expired on the first Monday in December, 1928.

It is, therefore, on motion of Moody & Moody, and Gentry Hall, attorneys for the plaintiffs, considered, adjudged and decreed by the court that the plaintiff, S. R. Patterson, is entitled to receive from the defendant, W. C. Martin, the tax lists, receipt books and other records and documents now in his possession relating to the taxes of said county for the year 1928, and to collect the remainder of said taxes, as required by law, and to receive the emoluments therefor, as provided by law, and it is ordered that said W. C. Martin be and is hereby required to turn over and deliver to the plaintiffs the aforesaid lists, books and documents, and to report in writing to the plaintiffs, commissioners of said county, the correct amount of taxes of 1928 already collected by him.

It is further ordered and adjudged by the court that the plaintiffs have and recover of the defendant their costs in this action incurred, and that the defendant pay all the costs of this action."

To the court below signing the above judgment, defendant excepted, assigned error and appealed to the Supreme Court.

Moody & Hall for plaintiffs.
Alley & Alley, Edwards & Leatherwood for defendant.

CLARKSON, J. The single question presented by this appeal is whether the defendant was collecting the taxes in Swain County on a *salary* or *fee and commission* basis. We think he was collecting same on a *salary basis.* The determination of this controversy involves the construction of certain statutes.

Public-Local Laws 1919, ch. 134, sec. 8, in part: "Said sheriff and tax collector shall deduct from the full amount of said taxes so collected all commissions which are now or may hereafter be provided by law, out of which commission he shall retain the sum of eighteen hundred dollars per annum as full compensation for his services as tax collector."

Public-Local Laws 1921, ch. 422, sec. 1, in part: "*Provided,* that the total compensation of the sheriff shall not exceed the sum of thirty-two hundred dollars per annum."

Public-Local Laws 1923, ch. 163, in part: "Be amended by striking out the words 'thirty-two hundred' in line eight of said section and inserting in lieu thereof the words 'three thousand.'"

Public-Local Laws 1925, ch. 329, caption of act, is as follows: *"An act to regulate the salaries of the officers of Swain County."* Section 1. "That the compensation of the officers of Swain County shall be as follows: . . . The sheriff shall receive for his services as sheriff, the fees of his office, *and for his services as tax collector he shall receive three thousand two hundred and fifty dollars per annum, payable in equal monthly installments;* . . . Sec. 2. That all laws and clauses of laws in conflict with the provisions of this act are hereby repealed."

Public Laws 1927, ch. 213, sec. 7: "If any sheriff, or tax collector, to whom the tax list and receipt books shall be delivered on the first Monday in October, shall fail to succeed himself as such officer on the first Monday in December of any year, he shall make a full and complete settlement of such taxes as he may have collected on or before the first Monday in December, at which his term of office may expire, and the tax list and receipt books shall be delivered to his successor, who shall in his settlement be credited with the amount for which settlement was made with such officer whose term expired: *Provided, however,* that if the outgoing sheriff, or tax collector, shall have received the tax list and receipt books to collect the taxes due thereon, upon fees and commissions based upon the collections made, it shall be his duty, and he shall be charged with the collection of the taxes due for such year, and shall be charged with all the duties and responsibilities with reference to reports and other settlements, and subject to the same penalties, imposed by this act, and shall conduct the land sales and execute the certificates of sale for the same. If the officer whose term expires on the first Monday in December of any year and who does not succeed himself as such officer, shall not have received the tax books for the then tax year, the officer succeeding to such office shall give the required bond and be charged with the collection of the balance of the taxes for the then tax year, as if he had received the tax books on the first Monday in October, less, however, the taxes collected by the specially appointed tax collector."

It will be noted that the Public-Local act of 1925, *supra,* the caption says, "An act to regulate the salaries," etc., and the services as tax collector is fixed at $3,250 per annum, payable in equal monthly installments. This act repeals all laws and clauses of laws in conflict. Then the Public Laws of 1927, sec. 7, provides, in substance, a fair interpretation from the entire section and proviso, that if he is on a salary basis and fails to succeed himself, on the first Monday in December he shall make a full settlement, etc., and the tax list, etc., *shall* be delivered to his successor in office; and if he is collecting upon a basis of fees and commissions he is not required so to do. The provision seems to be broad enough to cover the counties on a *salary* or *fee and commission basis.*

The meaning of *Salary:* "The recompense or consideration paid, or stipulated to be paid, to a person at regular intervals for services; fixed regular wages, as by the year, quarter or month." Webster's New International Dictionary, p. 1871. "The word *salary* may be defined generally as a fixed annual or periodical payment for services, depending upon the *time* and not upon the amount of services rendered." 24 A. & E. Enc. of Law, 2 ed., p. 1015, 16 and 17. Black's Law Dict., 2 ed., "Salary," p. 1052 and cases cited.

The term *fees* "is distinguished from wages or salary in that it refers to compensation for particular acts, whereas, wages or salary refers rather to compensation for work during a definite period of time." 25 C. J., p. 1010.

We do not think *Commissioners v. Bain,* 173 N. C., p. 377, is applicable. See *Pender County v. King, ante,* 50. We are dealing here with a statute that is mandatory—the statute speaks in language in which we think there is no ambiguity. The judgment below is

Affirmed.

G. E. BROWN v. E. L. OSTEEN AND WIFE, ELLA M. OSTEEN.

(Filed 12 June, 1929.)

1. Bills and Notes D a—Provision in mortgage for acceleration affects only foreclosure and not notes secured thereby in which no provision is made.

Where there is no provision for acceleration in a series of notes secured by a mortgage on lands, but the mortgage itself provides that a failure to pay any of the notes or interest when due shall mature all the indebtedness thereby secured: *Held,* the provisions for acceleration appearing only in the mortgage affects only the right to foreclose the mortgage and does not affect the notes, and when action is taken before the maturity of some of the notes, as to them no recovery can be had.

2. Election of Remedies A—Upon discovery of fraud the injured party is put to his election to disaffirm or ratify contract.

Where fraud is alleged in the transaction wherein a mortgage is given on lands involving the assumption thereof by a grantee of the equity of redemption, and there is evidence tending to show that the defendant by his acts and conduct with knowledge of the alleged fraud received the benefits: *Held,* he was put to his election within a reasonable time after he discovered the fraud or should have done so in the exercise of

> reasonable diligence, to disaffirm his contract, and where he has not done so, and has received the benefits under the contract he may not successfully maintain his suit to cancel the contract, and ordinarily this is not open to him unless he is in a position to put the plaintiff in *statu quo*.

APPEAL by defendants from *Schenck, J.*, and a jury, at November Term, 1928, of HENDERSON. Modified and affirmed.

The plaintiff instituted this action against the defendants for the recovery of $2,166.66 and interest, the indebtedness represented by four notes or bonds under seal, dated Hendersonville, N. C., 24 May, 1926; one note due at 6 months for $541.66; one note due at 12 months for $541.66; one note due at 18 months for $541.66, and one note due at 24 months for $541.68, with interest after date at 6 per cent payable semiannually. All the notes or bonds with the exception as to when they become due, are like the first, which is as follows:

"$541.66. Hendersonville, N. C., 24 May, 1926.

Six months after date, without grace, we promise to pay to G. E. Brown.......................... or order, five hundred forty-one and 66/100......... dollars. For value received, payable at the office of the First Bank & Trust Co., Hendersonville, N. C. With interest after date at 6 per cent, payable semiannually. Protest, presentment and notice of dishonor or extension waived by all parties to this note.

(Signed) E. L. OSTEEN (Seal)
(Signed) ELLA M. OSTEEN (Seal)

No. ....
Due.................................."

On 24 May, 1926, the plaintiff executed and delivered to defendants a deed to three lots 28, 29 and 30, in the White addition to "Mountain Home," on the property a house was built by plaintiff which he contended cost him $3,297.79. The defendants, to secure the purchase price, to wit, the four notes or bonds above set forth, executed and delivered to plaintiff a mortgage on said lots. The deed and mortgage were duly recorded in the office of the register of deeds for Henderson County.

The mortgage had this provision: "A failure to pay any part of the interest, or any note or any part thereof, when due, shall mature all the indebtedness secured by the mortgage." This action was instituted 14 July, 1927, when only two of the notes were due.

The defendants set up as a defense actionable fraud and tendered a deed back to plaintiff for the property. The plaintiff's reply was that the contract was ratified after knowledge on the part of the defendants of the actionable fraud. The undisputed evidence on this aspect was as follows: Deed duly executed by defendants on 4 September, 1926, for lots 29 and 30 to Carl West. The said West, as a part of the consideration of the deed, assumed the payment of the following indebtedness as recited in the deed: "It is agreed as a part of the consideration for this conveyance that the party of the second part assumes and agrees to pay when due that deed in trust upon the within described property from G. E. Brown and wife, Mary C. Brown, to W. C. Meekins, trustee, which deed of trust is dated 24 March, 1926, securing notes as follows:

1 note for $416.67 dated 24 March, 1926, due 1 year from date.
1 note for $416.67 dated 24 March, 1926, due 2 years from date.
1 note for $541.66 dated 24 May, 1926, due 6 months from date.
1 note for $541.66 dated 24 May, 1926, due 12 months from date.
1 note for $541.66 dated 24 May, 1926, due 18 months from date.
1 note for $541.66 dated 24 May, 1926, due 24 months from date.

The last four notes made payable to G. E. Brown and wife, Mary C. Brown, payable at the First Bank and Trust Company, Hendersonville, N. C."

Defendants kept one lot, 28, and in addition to the assumption of the indebtedness by Carl West got from him two lots in Florida and one lot in Buncombe County, West Asheville. No cash was passed in this transaction. West sold the property to a Mr. Crabb, and defendants purchased the property back from Crabb and paid him $50.00. The property was rented by defendants, a sign "For Rent" was put on the property. Defendants collected $40.00 a month for three months. Defendants had work done on the house, and were offered $5.00 a month for the house without furniture, and rented it furnished. They had the woodwork to do over and had the plumbing fixed.

The issues submitted to the jury and their answers thereto, were as follows:

"1. Did the defendants, E. L. Osteen and Ella M. Osteen execute to the plaintiff, G. E. Brown, the four several notes as alleged in the complaint? Answer: Yes.

"2. Has any payment been made on said notes by the said defendants, or either of them? Answer: No.

"3. Was the execution and delivery of said notes procured by false and fraudulent representations of the plaintiff, G. E. Brown, or his agent, as alleged in the answer? Answer: Yes.

"4. Did the defendants, with knowledge of the false and fraudulent representations of the plaintiff, ratify the execution and delivery of said notes, as alleged in the reply? Answer: Yes.

"5. What amount, if any, are the defendants, E. L. Osteen and wife Ella M. Osteen, indebted to the plaintiff, G. E. Brown? Answer: $2,166.66 with interest.

"6. Did the plaintiff, G. E. Brown, procure the payment of the $500, as a part of the purchase price of the land described in the complaint, by false and fraudulent representations, made by the plaintiff, G. E. Brown, or his agent, as alleged in the answer? Answer: ....

"7. In what amount, if any, is the plaintiff, G. E. Brown, indebted to the defendants, E. L. Osteen and Ella M. Osteen? Answer: ...."

The judgment of the court below was as follows: "This cause coming on to be heard before the undersigned judge of the Superior Court and a jury, at November Term, 1928, and issues having been submitted to the jury and answered as appear in the record. It is therefore, considered, ordered and adjudged that the plaintiff have and recover of the defendants and each of them the sum of two thousand one hundred and sixty-six and 66/100 dollars ($2,166.66), with interest thereon from and after 24 May, 1926, until paid and the costs to be taxed by the clerk."

The defendants made numerous exceptions and assignments of error and appealed to the Supreme Court.

W. C. Meekins for plaintiff.
Ray & Redden and Blythe & Sheppard for defendants.

CLARKSON, J. In *Meadows Co. v. Bryan,* 195 N. C., at p. 401, the law is stated as follows: "There is no provision in the notes executed by E. W. Bryan and payable to Merrill Bryan, by the terms of which the maturity of the notes, not due according to their tenor, is accelerated upon default in the payment of any one of said notes; the provision for the acceleration of the maturity of said notes is contained in the mortgage, securing the same. This provision is applicable, therefore, only to the foreclosure of such mortgage, under the power of sale, or by civil action." *Walter v. Kilpatrick,* 191 N. C., 458.

As to the notes or bonds not due when this action was instituted, plaintiff's attorney frankly admits that the judgment should be modified, and we so hold.

The fourth issue is as follows: "Did the defendants, with knowledge of the false and fraudulent representations of the plaintiff, ratify the execution and delivery of the said notes, as alleged in the reply?" The defendants assign error as to the charge of the court below on this issue. We cannot so hold.

We have read with care the charge of the court below on this issue, both before and after the jury came into court and requested the court to recharge the law on this particular issue. Taking the charge as a whole and not disconnectedly, we think the court below clearly and fully charged the law as repeatedly set forth in the decisions of this Court. On this issue, after giving the contentions fairly to both sides of the controversy, the court charged, in part: "Now, gentlemen of the jury, our courts have said, as late as the 191st Report, which was issued in the year 1926, and the court charges you that this is the law: 'In order to rescind, however, the party injured must act promptly and within a reasonable time of the discovery of the fraud, or after he should have discovered the fraud by due diligence, and he is not allowed to rescind in part and affirm in part; he must do one or the other. And as a general rule the injured party is not allowed to rescind where he is not in a position to put the other party in *statu quo* by restoring the consideration passed. Furthermore, if after discovering the fraud the injured party voluntarily does some act in confirmation (recognition) of the contract, his power to rescind is then at an end.' The court has read to you from the case of *McNair v. Finance Co.,* Book 191, at bottom page 718 of the N. C., Report." *May v. Loomis,* 140 N. C., at p. 359.

The exceptions and assignments of error are not in accordance with *Rawls v. Lupton,* 193 N. C., 428, but notwithstanding this, we have considered the material ones.

For the reasons given, the judgment of the court below is

Modified and affirmed.

C. E. CATHEY, ADMINISTRATOR OF WILLIAM GRAHAM CATHEY, v. THE CITY OF CHARLOTTE AND SOUTHERN BELL TELEPHONE COMPANY.

(Filed 12 June, 1929.)

1. **Removal of Causes C b — Allegations of complaint will determine whether cause of action is stated against resident defendant.**

Upon a petition of the nonresident defendant for removal of the cause to the Federal Court for trial on the grounds of diversity of citizenship and separable controversy, the allegations of the complaint will alone be considered as to whether a joint tort is alleged, and where the allegations are sufficient and the resident defendant recognizes the jurisdiction of the State court by obtaining an extension of the time to answer, the petition for removal will be denied.

2. **Same—In this case held, complaint alleged joint tort of resident and nonresident defendants, and petition for removal should be denied.**

Allegations in the complaint in an action for wrongful death that the plaintiff's intestate was an employee of a city and was injured by the joint negligence of the city and the nonresident telephone company in connection with removing, by order of the city, its wire, used in its police and fire alarm system, from a pole erected by the nonresident telephone company under authority of an ordinance requiring that sound poles be used, and that the injury resulted from defects in the pole causing it to break and throw plaintiff's intestate to the ground: *Held*, a cause of action against both defendants as joint *tort-feasors* is stated, and the petition of the nonresident defendant for removal of the cause to the Federal Court for trial should be denied.

3. **Same—Nonresident defendant may not raise question of nonliability of the resident defendant because of its being municipal corporation.**

Where a city and a nonresident telephone company are sued in the State Court a joint tort causing the death of the plaintiff's intestate, and the city does not file a demurrer but obtains an extension of time in which to answer, the nonresident defendant cannot raise the question by its petition for removal of the cause to the Federal Court on the ground that the action is separable, whether or not the city was liable for that its employee was injured in the exercise of the city's governmental functions.

4. **Municipal Corporations E a—Municipal corporation is not liable for negligent injury to its employee in exercise of governmental functions.**

A city is not liable in damages for negligence causing injury or death to its employee while performing his duty as such in connection with removing a wire on a pole used by the city in connection with its police and fire alarm system.

APPEAL by plaintiff from *Sink, Special Judge,* at March Term, 1929, of MECKLENBURG. Reversed.

This is an action to recover damages for the wrongful death of plaintiff's intestate, caused, as alleged in the complaint, by the joint and concurrent negligence of defendants.

Plaintiff is a citizen of the State of North Carolina; he instituted this action in the Superior Court of Mecklenburg County as administrator of his son, William Graham Cathey, who at the date of his death was a citizen of the State of North Carolina, and a resident of Mecklenburg County.

The defendant, the city of Charlotte, is a municipal corporation, organized and existing under the laws of the State of North Carolina.

The defendant, Southern Bell Telephone Company, is a corporation, organized under the laws of the State of New York, with its principal office in said state, and engaged in business in the State of North Carolina, as authorized by its charter.

The value or amount in controversy in this action, which is of a civil nature, exceeds the sum of $3,000, exclusive of interest and costs.

From judgment that the action be removed from the Superior Court of Mecklenburg County to the District Court of the United States for the Western District of North Carolina, Charlotte Division, for trial, in accordance with the prayer of the petition, duly filed by the defendant, Southern Bell Telephone Company, the plaintiff appealed to the Supreme Court.

John M. Robinson and Hunter M. Jones for plaintiff.
T. C. Guthrie for defendant.

CONNOR, J. It appears on the face of the complaint that on 1 September, 1902, an ordinance was duly adopted by the city of Charlotte, by which permission was granted to the Southern Bell Telephone Company to erect, maintain and operate lines of telephone and telegraph, including the necessary poles, etc., upon, along, and over the streets of the city of Charlotte, provided that all poles erected and maintained by said company in said city should be sound, strong, neat and symmetrical. In consideration of the passage of said ordinance, the said Telephone Company agreed to provide one cross-arm on each pole, when requested so to do by the city of Charlotte, for the free use of its police and fire alarm system.

Some time prior to 8 January, 1929, in accordance with the provisions of the said ordinance, the Southern Bell Telephone Company erected and installed one of its poles in the city of Charlotte, near the corner of East Fourth Street and Caswell Road. The city of Charlotte, thereafter, under the provisions of said ordinance, and with the knowledge, consent and approval of the Telephone Company, placed one of its electric wires on said pole. This wire was a part of the apparatus used by the said city in its police and fire alarm system.

On 8 January, 1929, pursuant to the request of the Telephone Company that it remove said wire from the said pole, the city of Charlotte ordered and directed plaintiff's intestate, who was at that time an employee of the said city, to climb the said pole, and to remove the said wire therefrom. Plaintiff's intestate climbed the said pole, as he was ordered and directed to do by the city; while he was at work removing said wire, the said pole broke and fell, hurling him to the ground with such force and violence as to cause injuries which resulted in his death.

It is alleged in the complaint that the death of plaintiff's intestate was caused by the joint and concurrent negligence of defendants, as specifically set out therein, and that as the result of his wrongful death, plaintiff as his administrator, has been damaged in the sum of $75,000. Each of the allegations in the complaint involves an allegation that there were defects in said pole, at the time it was erected and installed by the Telephone Company, or at the time plaintiff's intestate was ordered and directed by the city of Charlotte to climb the pole, and to remove the wire therefrom, at the request of the Telephone Company. Prior to the institution of this action, plaintiff presented to the city of Charlotte his claim for damages, as he was required to do by the statute, and by a provision in the charter of said city, and demanded payment of said claim. The city of Charlotte refused and neglected to pay said claim, and thereafter plaintiff instituted this action against both the defendants.

In apt time, the defendant, Southern Bell Telephone Company, filed its petition, pursuant to the provisions of the act of Congress, for the removal of the action from the Superior Court of Mecklenburg County to the District Court of the United States for the Western District of North Carolina, Charlotte Division, for trial, upon the sole ground that upon the allegations of the complaint, the defendant, the city of Charlotte, is not liable, in law, to the plaintiff in this action, and that, therefore, the cause of action alleged in the complaint is against the Southern Bell Telephone Company, alone. The defendant, the city of Charlotte, has filed no demurrer or answer to the complaint; it has, however, applied for and obtained an order extending the time within which it is required to file pleadings. From the judgment affirming the order of the clerk of the Superior Court of Mecklenburg County, and ordering and directing that the action be removed for trial, in accordance with the prayer of the petition, plaintiff appealed to this Court.

It appears from the allegations of the complaint that the wire which plaintiff's intestate was ordered and directed by the defendant, the city of Charlotte, to remove from the pole, which had been erected and maintained by the defendant, Southern Bell Telephone Company, under the provisions of the ordinance of the city of Charlotte, was a part of the apparatus used by the city of Charlotte for its police and fire alarm system. In the erection and maintenance of its police and fire alarm system, the city of Charlotte, as a municipal corporation, was engaged in the exercise of a governmental function. *McIlhenney v. Wilmington,* 127 N. C., 146, 37 S. E., 187, *Peterson v. Wilmington,* 130 N. C., 76, 40 S. E., 853. It is the general rule in this as well as in other jurisdictions that municipal corporations when engaged in the exercise of powers and in the performance of duties conferred and enjoined upon them for the public benefit, may not be held liable for torts and wrongs by which their employees or others sustain injuries, resulting in damages, unless made liable by statute. *Parks-Belk Co. v. Concord,* 194 N. C., 134, 138 S. E. 599; *Price v. Trustees,* 172 N. C., 84, 89 S. E., 1066. In *Scales v. Winston-Salem,* 189 N. C., 469, 127 S. E., 543, it is said in the opinion written by *Adams, J.:* "The nonliability of a municipal corporation for injury caused by negligence in the exercise of its governmental functions may be illustrated by cases in which it is held that a city is not liable for a policeman's assault with excessive force, or for the suspension of a town ordinance indirectly resulting in damage to property, or for injury to an employee while in the service of the fire department, or for failure to pass ordinances for the public good, or for the negligent burning of trash and garbage, or for personal injury caused by the negligent operation of a truck by an employee in the service of the sanitary department of a city." See cases cited in the opinion. In accordance with this principle it was held in that case that the defendant, a municipal corporation was not liable to an employee for damages resulting from injuries caused by the negligent construction of a furnace as a part of an incinerator constructed and used by the defendant for the purpose of burning trash and refuse collected within the corporate limits of the defendant city. A judgment overruling a demurrer to the complaint, on the ground that it appeared from the allegations thereof that the construction and operation of the incinerator was in the exercise of a governmental function, was reversed, on defendant's appeal to this Court.

This principle is so well settled by authoritative decisions of this Court, and by decisions of courts of other jurisdictions, that in the absence of its abrogation or modification by statute, it cannot be questioned. Whether it should be abrogated or modified in this State, in view of changed conditions, enlarging the functions of municipal corporations, must be determined by the General Assembly. The principle, however, is not determinative of the question presented by this appeal. The city of Charlotte has not demurred to the complaint. Whether or not the complaint is subject to its demurrer, upon the ground that it is not liable to the plaintiff upon the facts alleged therein, is not now presented for decision. The nonresident defendant, Southern Bell Telephone Company, cannot raise the question, by its petition for the removal of the action from the State court to the Federal court, for trial, on the ground that the action is separable, as to whether the resident defendant, the city of Charlotte, is liable, upon the allegations of the complaint to the plaintiff in this action.

"A directed verdict, without the plaintiff's assent in favor of a resident defendant whose presence has heretofore prevented a removal for a separable controversy does not operate to make the case then removable; nor is that effect produced by a ruling of the court that, as to the resident defendant, there is not sufficient evidence to warrant a verdict, and sustaining a demurrer to the evidence, nor by a judgment dismissing the action as against the resident defendant, and though such judgment is affirmed by an intermediate court; nor by the taking of an involuntary nonsuit by the plaintiff as to the resident defendant, with a view not to abandon prosecution of the suit, but to test the correctness of the ruling by appeal. Only a voluntary dismissal by the plaintiff as to the resident defendant puts the latter out of the case." 23 R. C. L., 682. See cases cited.

"The Federal Supreme Court has repeatedly affirmed, not only in cases of joint contracts, but in actions for torts, which might have been brought against all or against any of the defendants, that separate answers by the several defendants sued on joint causes of action, may present different questions for determination, but they do not necessarily divide the suit into separate controversies. The cause of action is the subject-matter of the controversy and that is for all purposes of the suit whatever the plaintiff declares it to be in pleading. A defendant has no right to say that an action shall be several which a plaintiff elects to make joint. Each party defends for himself, but until his defense is made out, the case stands against him and the rights of all must be governed accordingly. 23 R. C. L., 679. See cases cited.

There is error in the judgment ordering and directing the removal of the action from the State Court to the Federal Court, for trial. The judgment is

Reversed.

C. D. BARBOUR v. THE COUNTY OF WAKE AND DR. O. L. RAY, L. Y. BALLENTINE, SAM T. BENNETT, D. H. POPE, AND W. L. WIGGS, AS MEMBERS OF THE BOARD OF COMMISSIONERS OF THE COUNTY OF WAKE.

(Filed 12 June, 1929.)

1. **Taxation A a—Bonds for maintenance of highways are for necessary expense and do not require submission to voters.**

Bonds issued by a county for the construction and maintenance of its highways are for a necessary county expense within the intent and meaning of the State Constitution, Art. VII, sec. 7, and may be validly authorized by general or special statute and issued by the county thereunder without submitting the question of their issuance to the approval of the voters of the county.

2. **Same—Bonds issued to refund other bonds are for special purpose and do not fall within Constitutional limitation on tax rate.**

Where the municipal finance act does not apply to refunding certain bonds of a county, issued prior to its operating effect, and the bonds become due and payable, and there is no provision made for their payment, the act of the board of county commissioners in paying them out of the general county fund as a temporary arrangement, using the bonds as collateral to secure the repayment by refunding bonds to be authorized by the Legislature: *Held*, the bonds later authorized by the Legislature and issued by the county to refund the indebtedness to the general county fund are for a special purpose and do not fall within the general limitation of fifteen cents on the one hundred dollars valuation prescribed by the Constitution. Art. V, sec. 6.

3. **Same—County commissioners may borrow from general fund to preserve county credit and issue refunding bonds under valid Legislative authorization.**

The board of county commissioners, having the supervision and control of roads, bridges, and the levying of taxes and the finances of the county, Constitution, Art. VII, sec. 2, have the authority by proper resolution to borrow from the general county fund moneys with which to pay maturing bonds of the county when due, being necessary to preserve the credit of the county, and to issue refunding bonds for the purpose of repaying this loan under a valid statute providing therefor and declaring itself to be a special statute validating and legalizing the transaction.

4. **Statutes A c—Act of Legislature ratifying act of county commissioners, which it could have authorized, not objectionable as retroactive.**

A statute passed to preserve the credit of a certain county in enabling it to meet the payment of its bonds when due, authorizing the issuance of refunding bonds and ratifying the act of the county commissioners in borrowing from the general county fund pending the authorization and issuance of the refunding bonds, is not objectionable as a retroactive statute under the facts of this case.

APPEAL by plaintiff from *Lyon, J.*, 26 April, 1929. From WAKE. Affirmed.

Controversy without action. *Facts:* Prior to the adoption of the County Finance Act by the General Assembly on 7 March, 1927, the county of Wake had incurred indebtedness for the purpose of construction and reconstruction of highways and bridges in said county, of $195,000, and for maintenance of highways and bridges of $5,000.

On 1 January, 1929, there became due $28,000 of bonds of said county $8,000, issued on 1 January, 1899; $20,000 issued 1 January, 1909, pursuant to act of the General Assembly, for the payment of which no sinking funds were authorized or created. The board of commissioners of said county, being forbidden by what is known as the Harris Act, ch. 509, Public-Local Laws of 1925, to issue any bonds without a vote of the people, could not refund the same under the provisions of the County Finance Act, and to save the credit of the county pending the early sitting of the General Assembly, there being in the county general fund sufficient funds, already allocated to other purposes, but which could temporarily be used for this purpose, by resolution, borrowed from the general county fund the said $28,000, and took up said bonds and directed "that the said bonds be held by the treasurer of said county as security for said loan, to be later retired by refunding bonds."

By an act of the General Assembly of 1929, to wit, chapter 112 of the Public-Local Laws of said session, ratified 1 March, 1929, the board of commissioners of the county of Wake were expressly authorized:

1. By section 1(a) to issue bonds of the said county for indebtedness of said county incurred "Prior to the passage of the County Finance Act for the special purpose of building, rebuilding, and maintaining the public roads and bridges of the county of Wake."

2. By section 1(c) to issue bonds of the said county for indebtedness of said county incurred, "on 1 January, 1929, in retiring $8,000 of bonds of said county of Wake issued 1 January, 1899, and $20,000 of bonds issued on 1 January, 1909, no provision for the payment of either of said issues having been made, and paid when due, out of moneys advanced from the general fund of the county of Wake for the year 1928, said fund having theretofore been allocated to the county budget."

The facts in connection with the aforesaid indebtedness are set out in the preamble of said act, and by section 1(e), "All such outstanding indebtedness incurred by said county for said purposes is hereby legalized, validated and declared to be for a special purpose." There is no question as to the passage of the act having been according to constitutional requirements.

Pursuant to, and in accordance with, the terms of said act, the board of commissioners of the said county of Wake duly passed a resolution providing for the issuance of said bonds; that part of said resolution, pertinent hereto, as relates to the bonds herein sought to be restrained, as to the issuance of the $200,000 of bonds, appears in section 1 of said resolution, section 2 of said resolution, section 11 of said resolution, and in the third paragraph of the amended resolution, and as to the $28,000 of bonds appears in section 1 of said resolution, section 4 of said resolution, section 11 of said resolution and in the third paragraph of the amended resolution.

On the .... day of ...., 1929, this action to restrain the issuance of the said bonds was begun, the plaintiff and defendants agreeing on the facts and submitting a case agreed. His Honor, C. C. Lyon, judge, holding the courts of the Seventh Judicial District, refused to restrain their issuance. Plaintiff appealed to the Supreme Court and assigned the following errors:

"1. For that the court erred in not holding that the issuance of the $200,000 of bonds is unlawful and should be enjoined.

2. For that the court erred in not holding that the issuance of the $28,000 of refunding bonds will be unlawful and should be enjoined.

3. For that the court erred in signing judgment as set out in the record."

J. C. Little for plaintiff.
P. J. Olive and John W. Hinsdale for defendants.

CLARKSON, J. The plaintiff assigned error as follows: "1. For that the court erred in not holding that the issuance of the $200,000 of bonds is unlawful and should be enjoined." We cannot so hold.

Constitution of N. C., Art. VII, sec. 7, is as follows: "No county, city, town or other municipal corporation shall contract any debt, pledge its faith or loan its credit, nor shall any tax be levied or collected by any officers of the same except for the necessary expenses thereof, unless by a vote of the majority of the qualified voters therein."

It has been held in this jurisdiction that the construction and repair of bridges and roads are necessary expenses. To contract a debt for such purposes, a vote of the majority of the qualified voters of a county is not a prerequisite. *Herring v. Dixon,* 122 N. C., 420; *Crocker v. Moore,* 140 N. C., 432; *Hendersonville v. Jordan,* 150 N. C., 35; *Commissioners of Yancey v. Road Commissioners,* 165 N. C., 632; *Moose v. Commissioners of Alexander,* 172 N. C., 419; *Woodall v. Highway Commission,* 176 N. C., 377; *Parvin v. Commissioners of Beaufort,* 177 N. C., 508; *Guire v. Commissioners of Caldwell,* 177 N. C., 516; *Davis v. Lenoir,* 178 N. C., 668.

Constitution of N. C., Art. V, sec. 6 (N. C. Code, 1927, anno.) is as follows: "The total of the State and county tax on property shall not exceed fifteen cents on the one hundred dollars value of property, except when the county property tax is levied for a special purpose and with the special approval of the General Assembly, which may be done by special or general act: *Provided,* this limitation shall not apply to taxes levied for the maintenance of the public schools of the State for the term required by article nine, section three, of the Constitution: *Provided further,* the State tax shall not exceed five cents on the one hundred dollars value of property."

In *R. R. v. Reid,* 187 N. C., at p. 324, it is said: "While the construction and maintenance of the county home and the building and repairing of bridges may be considered a part of the ordinary expenses of the county, to be defrayed out of the general county revenue when sufficient for these purposes, still a tax levied under a special or general act for the specific and exclusive purpose of constructing, maintaining or repairing courthouses, jails, county homes, highways, or bridges is deemed to be levied for a special purpose, . . . *Brodnax v. Groom,* 64 N. C., 244; *Jones v. Commissioners,* 107 N. C., 248; *Williams v. Commissioners,* 119 N. C., 520; *Herring v. Dixon, supra; R. R. v. Commissioners,* 148 N. C., 220, 240; *Jackson v. Commissioners,* 171 N. C., 379, 382; *Moose v. Commissioners,* 172 N. C., 419, 428; *Parvin v. Com-*

missioners, 177 N. C., 508; *R. R. v. McArtan,* 185 N. C., 201." *Commissioners v. Assell,* 194 N. C., 412; *Owens v. Wake County,* 195 N. C., 132; *Commissioners v. Assell,* 195 N. C., 719; *R. R. v. Cherokee County,* 195 N. C., 756; *Mayo v. Commissioners of Beaufort,* 196 N. C., 15.

Plaintiff assigns as error: "2. For that the court erred in not holding that the issuance of the $28,000 of refunding bonds will be unlawful and should be enjoined." We cannot so hold.

On 1 January, 1929, there became due $28,000 of bonds of Wake County, $8,000 issued 1 January, 1899, and $20,000 issued 1 January, 1909. No provision had been made for the payment of these valid and outstanding bonds of the county. It was important that the credit of the county be maintained. The board of commissioners of Wake County, by resolution, borrowed from the general county fund the $28,000 and took up said bonds, and the resolution in regard to the transaction was to the effect "that the said bonds be held by the treasurer of said county as security for said loan, to be later retired by refunding bonds." To meet an emergency like the one in question, we can find nothing to criticize.

Constitution of N. C., Art. VII, sec. 2, is as follows: "It shall be the duty of the commissioners to exercise a general supervision and control of the penal and charitable institutions, schools, roads, bridges, levying of taxes, and finances of the county, as may be prescribed by law. The register of deeds shall be, *ex officio,* clerk of the board of commissioners."

We know of no statute, and none was called to our attention, prohibiting the doing of what was done in the present case. It was a temporary loan to meet a pressing emergency to save the county's credit. It was afterwards approved by Legislative enactment. In reference to the indebtedness, the preamble of the act of the General Assembly of 1929 is as follows: "All such outstanding indebtedness incurred by said county for said purposes is hereby legalized, validated and declared to be for a special purpose."

As was said in *Board of Education v. Commissioners,* 183 N. C., at p. 302: "Subject to certain exceptions, the general rule is that the Legislature may validate restrospectively any proceeding it might have authorized in advance." *Construction Co. v. Brockenbrough,* 187 N. C., at p. 77; *Storm v. Wrightsville Beach,* 189 N. C., at p. 683; *Holton v. Mocksville,* 189 N. C., 144; *Commissioners v. Assell,* 194 N. C., at p. 418. The judgment of the court below is

Affirmed.

JANE AUSTIN, ADMINISTRATRIX OF THE ESTATE OF REUBEN AUSTIN, DECEASED, v. SOUTHERN RAILWAY COMPANY, AND DILLY MYERS.

(Filed 12 June, 1929.)

1. **Master and Servant E a—Liability of railroad for injury to employee engaged in interstate commerce is governed by Federal decisions.**

The liability of a railroad company to its employee for injuries sustained by him while engaged in interstate commerce is governed by the Federal Employer's Liablity Act and the applicable principles of the common law as applied by the Federal Courts.

2. **Master and Servant E b—Plaintiff must show that defendant's violation of Federal statute was proximate cause of injury.**

Held, in order for a recovery under the Federal Employers' Liability Act there must appear under the evidence that the defendant was guilty of some negligence or the violation of a Federal statute which proximately caused the injury in suit.

3. **Same—Evidence of defendant's negligence insufficient to be submitted to jury in this case.**

Where the evidence tends only to show that the plaintiff's intestate was employed by the defendant as a track inspector, and that he was found one morning, after a severe storm during the night, near the track under circumstances tending to show that he had been struck by one of the defendant's trains, with further evidence that he had been continuously at work for a length of time in excess of that allowed by the Federal Statute, without evidence as to how the injury occurred: *Held*, the evidence raises conflicting inferences in favor of both parties and falls within the field of conjecture, and, the burden being on the plaintiff to establish the negligence of the defendant and the causal connection between it and the injury, defendant's motion as of nonsuit should have been granted.

APPEAL by plaintiff from a judgment of nonsuit rendered by *Sink, Special Judge,* at November Special Term, 1928, of BUNCOMBE. Affirmed.

When the case was called for trial plaintiff took a voluntary nonsuit as to the defendant Myers, and the action was prosecuted only against the Southern Railway Company.

Geo. M. Pritchard for plaintiff.
Thos. S. Rollins for defendant.

ADAMS, J. The plaintiff's intestate lived with his mother near the depot at Alexander, a station on the defendant's line in Buncombe County. He had been in the regular service of the defendant as a section hand for more than three years, and in its intermittent service for five or six years. He was about twenty years of age. On Saturday night, 3 December, 1927, the weather was foul: rain, snow, and sleet imperiled the track and the operation of trains. The intestate was engaged as one of the defendant's section crew in the inspection of the roadbed, a part of his service being to walk the track and to look for slides. The limit of his "walk" was about a half-mile from the station. During the night several trains passed, four going west and five going east. The defendant was engaged and the deceased was employed in interstate commerce. At ten o'clock in the night his brother saw him walking the track near the depot. His mother saw him a few minutes after four on Sunday morning. Afterwards two trains passed, one going down, the other up the river. The dead body was found between six and seven o'clock in the morning about twelve feet below the point of the switch, the head about ten inches from the crossties. Blood and a part of the skull were found at the point of the switch and the lanterns he used about five feet outside the iron rail. There was a cut on the right side of the head, and it was afterwards noticed that the right arm and the right knee had been injured.

The plaintiff's right to recover damages is dependent upon the Federal Employers' Liability Act and the applicable principles of the common law as interpreted by the Federal courts. *Southern Ry. Co. v. Gray,* 241 U. S., 333, 60 Law Ed., 1030. This act provides that every common carrier by railroad while engaging in interstate commerce shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment. 45 U. S. C. A., 92, sec. 51. Negligence of the carrier, or of its officers, agents, or employees, or defective or insufficient equipment due to its negligence is the basis of its liability. Therefore, before a recovery can be had it must be shown by direct or circumstantial evidence that the carrier was negligent. *Ill. Cent. R. Co. v. Skaggs,* 240 U. S., 66, 60 Law Ed., 528. On this point there is a failure of proof. No one saw the accident. There is no evidence as to the circumstances under which the death occurred—no sufficient evidence as to the intestate's position, no evidence of the defendant's actionable negligence. There is evidence that death was caused by the impact of the train, but this is not enough to make actionable negligence: negligence is not presumed from the mere fact that the intestate was killed. *Lamb v. Boyles,* 192 N. C., 542; *Isley v. Bridge Co.,* 141 N. C., 220; *So. Ry. Co. v. Gray, supra.* In reference to negligence and proximate cause the evidence leads into the broad field of conjecture or speculation; from it different minds may draw different inferences, all imaginative, none substantial. "When the undisputed evidence is so conclusive that the court would be compelled to set aside a verdict in opposition to it, it may withdraw the case from the consideration of the jury and direct a verdict." *Elliott v. R. R.,* 150 U. S., 245, 37 Law Ed., 1068.

The appellant says that the defendant compelled the deceased to work in violation of the statute limiting the hours of service. It is made unlawful for common carriers by railroad engaged in interstate commerce to require or permit any employee to be or remain on duty for a longer period than sixteen consecutive hours. At the end of this period the employee shall be relieved and not required or permitted again to go on duty until he has had at least ten consecutive hours off duty; and if he has been on duty sixteen hours in the aggregate in any twenty-four hour period he shall not be required or permitted to continue or again go on duty without having had at least eight consecutive hours off duty. 45 U. S. C. A., 546, sec. 61, 554, sec. 62.

There is evidence that the deceased was required to work in breach of this statute. But this requirement did not make the defendant unconditionally liable in damages. A necessary element of liability is some causal relation between the employee's working overtime and the injury he receives. In disapproving the conclusion that the act of a carrier in extending an employee's service beyond the statutory limit was negligence *per se,* to which the death of the deceased was held to be attributable as a matter of law, the Supreme Court of the United States explained the scope and meaning of the statute in *S. Louis I. M. & S. R. Co. v. McWhirter,* 229 U. S., 265, 57 Law Ed., 1179. *Chief Justice White* said: "In giving to the statute the construction above stated, we think error was committed. The hours-of-service act was approved 4 March, 1907, and is entitled, 'An act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon.' Ch. 2939, 34 Stat. at L., 1415, U. S. Comp. Stat. Supp., 1911, p. 1321. We are unable to discover in the text of the statute any support for the conclusion that it was the purpose of Congress in adopting it to subject carriers to the extreme liability of insurers, which the view taken of the act by the court below imposes. We say this because, although the act carefully provides punishment for a violation of its provisions, nowhere does it intimate that there was a purpose to subject the carrier who allowed its employees to work beyond the statutory time to liability for all accidents happening during such period, without reference to whether the accident was attributable to the act of working overtime. And we think that where no such liability is expressed in the statute, it cannot be supplied by implication. It requires no reasoning to demonstrate that the general rule is that, where negligence is charged, to justify a recovery it must be shown that the alleged negligence was the proximate cause of the damage."

As the evidence fails to disclose the circumstances of the accident, we find no ground upon which to rest the theory that the intestate's working over the statutory time was the proximate cause of his death.

We are referred by the appellant to *Great Northern Ry. Co. v. Couture,* 14 Quebec K. B., 316, and *Republic Iron & Steel Co. v. Ohler,* 68 N. E. (Ind.), 901, in which it was held that a master may be liable in damages for injury sustained by a servant who has been compelled to work continuously for an undue number of hours; but in these cases the circumstances attending the accident were disclosed and the causal relation between the servant's overwork and the injury was established by the evidence. They are therefore not in point here. The judgment is

Affirmed.

M. M. MORRISON, J. G. MORRISON, AND LELIA A. MORRISON, v. SOUTHERN STATES FINANCE COMPANY, INC., ET AL.

(Filed 12 June, 1929.)

1. **Evidence I b—Introduction in evidence of books of corporation not error under the facts of this case.**

   Where a finance company is sued for fraudulent representations of its financial condition in procuring a sale of its shares of stock to the plaintiff, exceptions to the introduction of some of its books relative to the inquiry and used by both parties in the examination and cross-examination of the secretary of the company as a witness will not be sustained as error.

2. **Evidence F c—Introduction in evidence of pleadings as admissions of parties not error in this case.**

   Under the facts of this case: *Held,* exceptions to the introduction in evidence of the pleadings as admissions of the parties are untenable under the decision of *Weston v. Typewriter Co.,* 183 N. C., 1, and other cases cited.

3. **Evidence I c—Admission of insufficiently identified letters in evidence is error.**

   Upon the issue of fraudulent representations inducing the plaintiff to subscribe for stock in a corporation, letters of general circularization, purporting to have been signed by the corporation's president and received by the plaintiff, having a material relation to the determination of the issue, are improperly introduced in evidence upon the trial when not further identified as issued by the company, but where the subject-matter of the letters is proved by competent evidence the error is harmless.

4. **Evidence H a—Where a conspiracy is not alleged conversation of codefendants is erroneously admitted in evidence.**

   Where a conspiracy to defraud the plaintiff is not alleged in a suit against the corporation and certain of its officers for fraudulently inducing the plaintiff to subscribe for stock in the corporation, conversations of some of the defendants in the absence of the others are erroneously admitted in evidence as to them.

5. **Corporations D h—In action against corporation for fraudulently inducing purchase of stock plaintiff must show that corporation was involved.**

   Where a corporation and some of its officers are sued to cancel certain shares of stock issued to the plaintiffs for fraudulent representations alleged as an inducement to purchase them, there must be sufficient evidence that the corporation was implicated in the transaction to hold it liable thereon.

CIVIL ACTION, before *Oglesby, J.*, at October Term, 1928, of CABARRUS.

The plaintiffs alleged that the defendant, Southern Finance Company, was a foreign corporation engaged in business in Charlotte, North Carolina, and that the individual defendants were officers and directors of said corporation, Walker being president; Ashcraft, vice-president; Rhyne, vice-president; and Cherry, secretary and treasurer, and that said defendant, through its active officials, placed upon the market a large quantity of preferred and common stock for the purpose of sale, and employed agents and salesmen to solicit and sell said stock, and that one of said salesmen was J. A. Flournoy.

Plaintiff further alleged that in January and February, 1924, said Flournoy sold to plaintiffs, who were partners, two hundred shares of said stock, and thereafter on 14 April, 1924, sold to said plaintiffs one hundred and fifty shares of said stock at the price of ten dollars per share. It was further alleged that in making said sale the said agent, Flournoy, made false and fraudulent representations, which the plaintiffs relied upon, with respect to the financial condition of the Southern States Finance Company.

A nonsuit was taken as to the plaintiff, Lelia A. Morrison, leaving in controversy the purchase of one hundred and ninety shares for $1,900 in January, 1924, and one hundred and fifty shares for $1,500 in April, 1924.

Nineteen issues were submitted to the jury.

The jury, by its verdict, found that false representations had been made by said salesman, and that the individual defendants participated therein and ratified such representations. However, in response to the eleventh issue the jury found that the plaintiffs did not purchase the one hundred and fifty shares on 1 April, 1924, from the defendant, Southern Finance Company.

From judgment rendered both parties appealed.

Caldwell & Caldwell, R. Lee Wright and H. B. Adams for plaintiffs.

Hartsell & Hartsell and Armfield, Sherrin & Barnhardt for defendants.

BROGDEN, J. The defendants assigned one hundred and sixty-two errors, and the plaintiffs seventy-three.

As the late *Justice Allen* once remarked: It is highly improbable that a trial judge could make two hundred and thirty-five errors in one game.

One group of errors deals with the identification of the corporate records. These exceptions are without substantial merit, for the reason that Mr. Cherry, the secretary and treasurer of the corporation, was offered as a witness by the defendants, and he identified the books and records, although he indicated that certain of the records were not present at the trial. However, the records were used by both parties in examining and cross-examining witnesses.

Another group of exceptions is addressed to admissions offered from the pleadings. These exceptions cannot be sustained. *Weston v. Typewriter Co.,* 183 N. C., 1, 110 S. E., 581; *Sears-Roebuck & Co. v. Banking Co.,* 191 N. C., 500, 132 S. E., 468; *Malcolm v. Cotton Mills,* 191 N. C., 727, 133 S. E., 7.

Another group of exceptions involves the introduction in evidence of certain circulars and letters addressed to the stockholders of the Southern States Finance Company and to individual stockholders, purporting to be signed by the president of the Southern States Finance Company. One of the plaintiffs testified, with respect to the letters, as follows: "My wife, brother and I received those letters through the mail. I can't testify the date we got it." Plaintiffs introduced ten letters, marked Exhibit T. Individual defendants objected. The objection was overruled, and the letters, without further proof of identification, were admitted in evidence. These letters and circulars contained representations to the effect that the company was in good financial condition and free from debt, and therefore had a material bearing upon the allegations of the complaint. The admission of the letters was error. *Trust Co. v. Store Co.,* 193 N. C., 122, 136 S. E., 289; *Bank v. Brickhouse,* 193 N. C., 231, 136 S. E., 636.

There is no allegation in the complaint charging a conspiracy, and no issue of conspiracy was submitted to the jury.

Certain exceptions were taken by the defendants to the admission of conversations between plaintiffs and others and certain of the individual defendants, when other individual defendants were not present. This evidence was incompetent as against the individual defendants not present at such conversations. *Edwards v. Finance Co.,* 196 N. C., 462.

There are other exceptions to the charge given by the trial judge to the jury, but these appear to be without merit.

There are other exceptions as to the competency of evidence warranting serious consideration, but as a new trial must be awarded to the defendants for the errors specified, we deem it inadvisable to discuss them at this time.

PLAINTIFFS' APPEAL.

The jury found in respect to the eleventh issue that the plaintiffs did not buy one hundred and fifty shares of stock in April, 1924, from the Southern States Finance Company. The evidence discloses that L. W. Tucker, Martin Tucker and Mrs. L. C. Tucker owned a large block of stock of the defendant Southern States Finance Company. They brought suit against the company and this stock was delivered by them to Mr. Hulin Davis, their attorney.

The evidence further disclosed that J. H. Flournoy came to the office of Mr. Davis and bought five hundred shares of this stock, paying therefor $2.50 a share. The purchase price was paid in New York Exchange or by cashier's check. Thereafter Flournoy took the stock to his attorney, Mr. Paul C. Whitlock, of Charlotte, who made demand on the Southern States Finance Company to transfer the stock to the plaintiffs upon the books of the corporation. This was done. A carbon copy of a letter from Mr. Paul C. Whitlock to the Southern States Finance Company was admitted in evidence over the objection of plaintiffs. This was error, as there was no notice to produce the original. *Chair Co. v. Crawford,* 193 N. C., 531, 137 S. E., 577.

However, in the cross-examination of Mr. Whitlock he testified that he had the stock transferred in person, but preferred that there be a record of the demand, and for that reason sent the letter offered in evidence. Thus the introduction of the letter was manifestly harmless.

There is no evidence that Flournoy bought the Tucker stock as agent of the Southern States Finance Company or paid for it with funds belonging to said company, or that said company ever had any information with respect thereto.

Upon this state of the record the judge would have been justified in giving a peremptory instruction upon this aspect of the case.

We hold therefore that the defendants are entitled to a new trial upon their appeal and that the judgment with respect to the appeal of the plaintiffs is

Affirmed.

POE & BENFIELD v. J. N. GILL.

(Filed 12 June, 1929.)

Contracts F b—Prior breach of contract by one party precludes his recovery for subsequent breach by other party who may recover on counterclaim therefor.

Where the purchaser of standing timber has knowledge of the right of his vendor's mortgagee to stop him from cutting timber on the *locus in quo* until a certain amount had been paid the mortgagee, and enters upon the land and cuts and manufactures timber under a provision that he pay therefor when sold, and there is evidence that he has not paid accordingly, and some time thereafter the mortgagee exercises his right to stop the cutting, and soon thereafter the vendor satisfies him and acquires the right to have the purchaser continue under his contract of sale of the timber, which the purchaser does not do: *Held*, the purchaser's action for damages for breach of contract is not upon warranty or covenant of peaceful enjoyment of the right of cutting timber, etc., and an instruction that the vendor's breach in the respect stated would prevent his recovery upon his counterclaim for the purchaser's breach is reversible error.

APPEAL by defendant from *Schenck, J.*, at September Term, 1928, of McDOWELL. New trial.

Action to recover of defendant damages for breach of contract. Defendant denied that he had breached the contract and alleged that plaintiffs had failed to perform said contract, on their part, and thereby caused him to suffer damages for which he demanded judgment against plaintiffs.

The issues submitted to the jury were answered as follows:

1. Did the defendant, J. N. Gill, breach his contract with the plaintiffs, Poe & Benfield, as alleged in the complaint? Answer: Yes.

2. If so, what amount are the plaintiffs, Poe & Benfield, entitled to recover of the defendant, Dr. J. N. Gill? Answer: $5,250.

3. Did the plaintiffs, Poe & Benfield, breach their contract with the defendant, Dr. J. N. Gill, as alleged in the answer? Answer: ....

4. If so, what amount is the defendant, Dr. J. N. Gill, entitled to recover of the plaintiffs, Poe & Benfield? Answer: ....

Under the instructions of the court, the jury having answered the first issue, "Yes," did not answer the 3rd and 4th issues.

From judgment on the verdict, defendant appealed to the Supreme Court.

Winborne & Proctor and W. T. Morgan for plaintiffs.
Hudgins, Watson & Washburn and Pou & Pou for defendant.

CONNOR, J. On 25 August, 1926, plaintiffs and defendant entered into a contract, in writing, by which defendant agreed to sell and convey to plaintiffs, "a certain tract of timber in McDowell County, North Carolina, same being on the lands known as the R. L. Greenlee land, and being near the Greenlee railway station on the Southern Railroad, and containing approximately one million feet of timber." Plaintiffs agreed to pay to defendant as the purchase price for said timber $7.00 per thousand feet.

The plaintiffs agreed to log and saw said timber, and to sell the lumber manufactured therefrom; they agreed to pay for said lumber when the same was sold, the money to be paid to defendant or to be deposited to his credit in a bank at Marion, N. C., from time to time as the lumber was sold.

At the date of said contract there was outstanding a mortgage on said timber and on the land on which it was located. This mortgage had been executed by defendant to R. L. Greenlee, from whom defendant had purchased the land, to secure the balance due by defendant to said Greenlee on the purchase price for said land. It was understood and agreed by and between defendant and the mortgagee that no timber should be cut and removed from said land, until the sum of $5,000 had been paid on the indebtedness secured by the mortgage. Plaintiffs alleged that defendant had agreed to procure the release of the timber from the mortgage, so that plaintiffs might cut and remove the same.

After the execution of the contract between plaintiffs and defendant, plaintiffs began to cut and manufacture said timber into lumber. Plaintiffs sold the said lumber from time to time, but failed to pay for same in accordance with the contract. They continued their operations until some time in the spring of 1927, when they ceased to cut and manufacture said timber into lumber. They allege that they were forced to cease their operations under the contract, because defendant had failed to pay to Greenlee the sum of $5,000, and that defendant ordered and directed them to cease said operations for that reason. This allegation is denied by defendant; he alleged that plaintiffs had failed to comply with their contract to pay for said timber as the lumber manufactured therefrom was sold. There was evidence tending to show that Greenlee, the mortgagee, waived his right to restrain defendant and plaintiffs from cutting and removing said timber, notwithstanding defendant had not paid him the sum of $5,000, until about 15 March, 1927, when he notified both defendant and plaintiffs that they must cease to cut and remove timber from said land, until defendant had paid him the sum of $5,000. There was evidence tending to show that defendant notified plaintiffs that they must cease their operations under the contract until he had satisfied Greenlee, and that plaintiffs thereupon did cease their said operations. In a short time thereafter defendant satisfied Greenlee, who thereupon withdrew further objection to the cutting and removing of said timber. Plaintiffs, however, did not renew their operations. There is no evidence tending to show that plaintiffs offered, thereafter, to continue to log and saw said timber, and to manufacture the same into lumber. There was a settlement between plaintiffs and defendant in June, 1927, for the amount due by plaintiffs to defendant on the purchase price of timber cut and removed from the land prior to the date when plaintiffs ceased their operations under the contract.

The court instructed the jury that if plaintiffs "were caused to stop either by Gill or Greenlee, who had a right to stop them, then that would be a breach of the contract on the part of Gill; if either Gill or Greenlee stopped the operations of plaintiffs, Poe & Benfield, that would constitute a breach of the contract, and that is the breach of the contract alleged in the complaint."

This instruction was error; this is not an action to recover damages for breach of covenant of title or of quiet enjoyment, but for the breach of his contract by defendant, J. N. Gill, in failing to procure the release of the timber from the mortgage which he had executed to Greenlee, thereby causing plaintiffs damage. Plaintiffs entered into the contract with defendant, with knowledge both actual and constructive, of the outstanding mortgage to Greenlee, and of his right as mortgagee to restrain them from cutting and removing the timber. The exercise of this right by Greenlee was not a breach by defendant of his contract with plaintiffs. There was evidence tending to show that defendant ordered plaintiffs to stop cutting the timber, not because of any objection on the part of Greenlee, but because plaintiffs had failed to pay for the timber as the lumber manufactured therefrom was sold.

There was evidence tending to show that plaintiffs had failed to comply with the contract, on their part, in that they had failed to pay for the timber as the lumber manufactured therefrom was sold, and that by reason of this default on their part, defendant had been unable to pay to Greenlee the sum of $5,000; and thereby procure the release of the timber from the mortgage. There was evidence, also tending to show that plaintiffs had failed to comply with the contract, in other respects, prior to the time when they ceased operations thereunder. In the absence of allegation and proof that plaintiffs had complied, at least substantially, with the terms of the contract, or that they were ready, willing and able to do so, they are not entitled to recover of defendant in this action. *Seed Co. v. Jennette Bros.,* 195 N. C., 173, 141 S. E., 542; *Edgerton v. Taylor,* 184 N. C., 571, 115 S. E., 156; *Owens v. Wright,* 161 N. C., 127, 76 S. E., 735; *Builders Supply Co. v. Roofing Co.,* 160 N. C., 443, 76 S. E., 498.

There are other assignments of error on defendant's appeal in this case, which do not require consideration, as there must be a new trial, for the error in the instruction to the jury as indicated.

New trial.

OLLIE H. TULL v. HARVEY & SON COMPANY.

(Filed 12 June, 1929.)

1. **Cancellation of Instruments A b—Fraud not presumed from deed from mortgagor to mortgagee when property conveyed not embraced in mortgage.**

In order for fraud to be presumed from the mortgagee's obtaining a deed from the mortgagor the deed must be a conveyance of the mortgaged premises, and the presumption does not apply when the mortgage is upon a distinct and separate tract owned by the husband of the mortgagor.

2. **Same—Where fraud is not presumed in an action for cancellation of deed it must be particularly alleged.**

Where the presumption of fraud does not apply to a deed given by a mortgagor to the mortgagee on lands not embraced in the mortgage, the mortgagor in her action to set aside the deed must allege in her complaint facts with such particularity as to show the fraud upon which the action is based, and in the absence of sufficient allegations in this respect a demurrer thereto is properly sustained.

3. **Pleadings D a—Where demurrer is good as to one cause of action and bad to the other, retention of good cause for trial is proper.**

Where allegations in a complaint are insufficient to state a cause of action to set aside a deed for fraud, but sufficient to state a cause of action against the grantee therein for failing to account for the purchase price, a demurrer to the complaint is properly sustained on the first cause of action, and overruled as to the second, and the trial court properly retains the second cause for trial, and may permit the plaintiff to amend her complaint as to the second cause in proper instances.

CIVIL ACTION, before *Grady, J.*, at Chambers, 21 November, 1928.

The plaintiff alleged that she was the owner of a tract of land in Lenoir County, containing 125 acres and known as the Highway tract, and that her husband was the owner of a tract of land in said county known as the Tower Hill tract; that on 18 January, 1919, the plaintiff and her husband executed and delivered to R. C. Strong, trustee for Henry Strong, a deed of trust on the Highway tract to secure an indebtedness of $5,000, and thereafter on 18 April, 1922, plaintiff and her husband executed and delivered to F. E. Wallace, trustee, for the National Bank of Kinston, a mortgage on said Highway tract to secure an indebtedness of $1,750.

Plaintiff further alleged that the following deeds of trust were executed by her and her husband on the Tower Hill tract, to wit:

(a) 24 July, 1919, to secure an indebtedness of $10,000 to the Farm Loan Bank of Columbia, South Carolina.

(b) 29 January, 1920, to secure an indebtedness of $2,000 to the National Bank of Kinston.

(c) 15 April, 1921, to secure an indebtedness of $5,259 due the defendant.

(d) 24 November, 1922, to secure an indebtedness of $1,846 due the defendant.

Thereafter on 2 February, 1923, the plaintiff and her husband executed and delivered to the defendant a deed for the said Highway tract belonging to the plaintiff for the sum of $12,000.

Plaintiff further alleged that the defendant secured a deed for her said "Highway tract" by means of fraud and coercion, for that "the defendant took undue advantage of the fact that the lands of both the plaintiff and her husband were encumbered by deeds of trust and mortgages as hereinbefore recited, unlawfully to induce, impel and coerce the plaintiff to execute to the defendant the said paper-writing, in form a deed, for her said Highway tract of land. And further, that during the fall of 1922 the defendant began to threaten and did threaten plaintiff and her husband with the foreclosure of the deed of trust on the Tower Hill tract," and "moved by such threats . . . the plaintiff and her husband decided to surrender Tower Hill farm to the defendant." Whereupon the "defendant dissuaded the husband of plaintiff from so surrendering said Tower Hill farm, and by fraudulent inducements and promises which deceived the plaintiff, caused a change of purpose of her said husband and the plaintiff to surrender Tower Hill and secure from the plaintiff and her husband by representations and assurances, which, as plaintiff believes and alleges, were fraudulent and never intended to be performed, the execution to the defendant of the paper-writing, in form a deed, for the Highway farm."

Plaintiff further alleged that the defendant had failed to account for the purchase price of said property and that said defendant had wrongfully and unlawfully misapplied said purchase price.

Upon these allegations the plaintiff asks:

(a) That the deed for the Highway tract be set aside and that she be permitted to redeem said land upon payment of the amount of the indebtedness thereon.

(b) And for such other relief as she might be entitled to.

The defendant filed a demurrer upon the ground that the complaint contained no allegation of fraud sufficient to constitute a cause of action.

The trial judge entered the following judgment:

"The defendant demurred to the complaint upon the ground that the complaint does not state facts sufficient to constitute a cause of action based upon fraud and misrepresentation; and, upon an inspection of the complaint, the court is of the opinion that no cause of action is alleged in respect to the charge of fraud, and the demurrer is sustained in that respect; but the court is of the opinion that a cause of action is sufficiently stated for money had and received, and in that respect the demurrer is overruled.

"Wherefore, it is now adjudged that the cause of action declared upon in respect to fraud and false representations be and the same is hereby dismissed, and the plaintiff is declared to be not entitled to recover in that respect.

"It is further adjudged that the plaintiff be permitted to amend the complaint so as to definitely set forth the facts in respect to the moneys had by the defendant from the purchase of the lands described in the complaint and known as the Highway tract, and the defendant will be permitted to answer said amended complaint within twenty days after service of a copy thereof on counsel."

From the foregoing judgment the plaintiff appealed.

Rouse & Rouse for plaintiff.
F. E. Wallace and Cowper, Whitaker & Allen for defendant.

BROGDEN, J. The record discloses that the defendant held no mortgage upon the Highway tract owned by the plaintiff. Therefore the relationship of mortgagor and mortgagee does not apply. The fact that the grantee in a deed holds a mortgage executed by the grantor on other property does not raise the presumption of fraud. *Hart v. Cannon,* 133 N. C., 10, 45 S. E., 351. Therefore, as there was no presumption of fraud arising from the relationship of the parties, it was necessary for the plaintiff to allege the specific facts, circumstances and acts constituting the fraud complained of. The principle of law is tersely expressed in *Colt v. Kimball,* 190 N. C., 169, 129 S. E., 406, as follows: "It is accepted in this jurisdiction that the facts relied upon to constitute fraud, as well as the fraudulent intent, must be clearly alleged." *Foy v. Stephens,* 168 N. C., 438, 84 S. E., 758; *Nash v. Hospital,* 180 N. C., 59, 104 S. E., 33. The complaint in the case at bar does not comply with the principle of law so announced.

The plaintiff, however, alleges that the defendant has not accounted to her for the purchase price of her tract of land, and she is entitled to be heard on this cause of action.

Affirmed.

IN THE MATTER OF THE LAST WILL AND TESTAMENT OF SUSAN B. SHEMWELL, DECEASED.

(Filed 12 June, 1929.)

Wills C d—Evidence that will was in handwriting of testator held sufficient, and held further, found among valuable papers.

Evidence that a paper-writing was in the handwriting of the deceased, signed by her, and found among her valuable papers is sufficient to be submitted to the jury on the issue of *devisavit vel non*, and *held further*, under the facts of this case the paper-writing, being found in a box in which she kept papers of value, evidently regarded as valuable by her, and evidencing her intent that the paper-writing operate as her will, was found among her valuable papers within the meaning of C. S., 4144(2), and evidence that her husband also kept certain valuable papers of his own in the same box does not vary the result.

APPEAL by the caveators from *Sink, Special Judge,* at November Special Term, 1928, of BUNCOMBE. No error.

Proceedings for the probate in solemn form of a paper-writing propounded as the holograph will of Susan B. Shemwell, deceased, by her son, named therein as one of the executors of the deceased.

The issue submitted to the jury was answered as follows:

"Is the paper-writing propounded by Fitzhugh Harmon for probate, and consisting of five separate sheets (marked Propounder's Exhibits 1, 2, 3, 4 and 5) and every part thereof, the last will and testament of Susan B. Shemwell, deceased? Answer: Yes."

In accordance with the verdict, it was ordered, adjudged and decreed that said paper-writing and every part thereof is the last will and testament of the said Susan B. Shemwell. From the judgment, the caveator appealed to the Supreme Court.

W. A. Sullivan for propounder.
Rollins & Smathers for caveator.

CONNOR, J. Susan B. Shemwell died in Asheville, on 19 February, 1924. She left surviving her husband, Baxter Shemwell, and three children, two of whom are the children of a former marriage.

On 20 February, 1924, a paper-writing purporting to be the last will and testament of Susan B. Shemwell, dated at Asheville on 31 May, 1920, was offered for probate and was probated in common form by the clerk of the Superior Court of Buncombe County, as the last will and testament of the deceased.

On 2 March, 1924, a caveat was filed to said probate by Everett B. Shemwell, son of deceased, appearing by his guardian, Baxter Shemwell. The cause was thereupon transferred to the Superior Court of Buncombe County for trial. Citations were duly issued and served upon all persons named in said alleged will as devisees and legatees. The proceedings came on for trial at November Special Term, 1928, of the Superior Court of Buncombe County, when the issue set out in the record was submitted to and answered by the jury. From judgment on the verdict, the caveator appealed to this Court.

At the trial, the propounder offered the paper-writing for probate as the holograph will of the deceased. Three witnesses testified that they verily believed that said paper-writing and every part thereof is in the handwriting of Susan B. Shemwell, and that her name subscribed thereto is also in her handwriting. These witnesses first testified that they had known Mrs. Susan B. Shemwell for many years and had often seen her write. There was the usual conflict in the testimony of the expert witnesses, offered by both the caveator and the propounder, one testifying that in his opinion the paper-writing was not in the handwriting of Mrs. Shemwell, and the other testifying that in his opinion it was in her handwriting. Both the expert witnesses based their opinion upon a comparison of the handwriting of the alleged will with handwriting proved to the satisfaction of the judge to be the genuine handwriting of Mrs. Shemwell. C. S., 1784. There was evidence from which the jury could find that the alleged will and every part thereof, including the name of the deceased subscribed thereto, is in her handwriting.

There was also evidence from which the jury could find that the paper-writing, which is in the handwriting of the deceased, with her name subscribed thereto, was found, after her death, among her valuable papers and effects, as required by the statute. C. S., 4144, subsec. 2. The evidence tended to show that the paper-writing was found in a small box, which had been in the possession of deceased for many years, and which was regarded by the members of her family, as her private box. In this box were papers and jewelry. Included among the papers were deeds, letters and stock certificates. Some of these papers were claimed by her husband as his property; they were delivered to him. Other papers and the jewelry in the box belonged to deceased. There was evidence tending to show that the paper-writing was found among such papers and effects of the deceased as show that she considered it as a paper of value, one deliberately made and to be preserved, and intended by her to have effect as her will. This was a sufficient compliance with the provision of the statute. *In re Will of Groce,* 196 N. C., 373, and cases there cited.

There was no error in the refusal of the court to instruct the jury, as requested by the caveator, to answer the issue, "No." The evidence was properly submitted to the jury, under instructions which are free from error. The judgment is affirmed. There is

No error.

IN RE THE ADMINISTRATION OF THE ESTATE OF THOMAS B. WALLACE, DECEASED.

(Filed 12 June, 1929.)

1. **Descent and Distribution B b—Statute legitimizing child upon marriage of parents is retroactive and gives such child right to inherit.**

   The provisions of C. S., 279, are retroactive as well as prospective in effect, and a child born out of wedlock whose mother marries his reputed father prior to the enactment of the statute is the heir of his parents who die subsequent to its enactment.

2. **Same—Statute legitimizing child strictly construed.**

   C. S., 279, declaring legitimate a child born out of wedlock whose reputed father subsequently marries his mother is strictly construed as being in derogation of the common law.

3. **Same — Statute legitimizing child does not give it right to inherit through deceased parents.**

   The provisions of C. S., 279, legitimizing a child born out of wedlock when his reputed father subsequently marries his mother for the purpose of inheritance from its father and mother does not extend to such inheritance from his maternal uncle dying intestate after the death of his mother through whom he claims as next of kin.

4. **Descent and Distribution B c—Where niece is one of the next of kin of intestate and survives him, her husband is entitled to distribution.**

   The estate of the intestate descends to his surviving brother and the children of his deceased brother living at his death, who are entitled to the distribution of the estate as his next of kin, C. S., 137(5), as also the husband of a deceased niece who was living at the death of the intestate, under the facts of this case.

APPEAL by respondent, Oscar Wallace, from *Stack, J.*, at April Term, 1929, of MECKLENBURG. Affirmed.

This is a proceeding instituted by the administrator of Thomas B. Wallace, deceased, for a final accounting and settlement of his estate.

The proceeding was begun by petition filed by said administrator against all persons interested in the due administration of the estate, and was heard by the judge of the Superior Court, in term time. C. S., 152.

After the payment of all claims against the estate, there is now in the hands of the petitioner, as administrator of Thomas B. Wallace, for distribution among the persons entitled thereto, the sum of $1,899.95.

From judgment that respondent, Oscar Wallace, is not entitled to any part of said sum, the said respondent appealed to the Supreme Court.

Stewart, McRae & Bobbitt for C. B. Cross, as administrator and as one of the next of kin of Thomas B. Wallace, deceased.

Fred C. Hunter for the children of D. B. Cross, deceased, as next of kin of Thomas B. Wallace, deceased.

G. T. Carswell and Joe W. Ervin for respondent.

CONNOR, J. Thomas B. Wallace died intestate on or about 1 July, 1927. At the date of his death, he was a resident of Mecklenburg County, North Carolina. The petitioner in this proceeding, C. B. Cross, was duly appointed by the clerk of the Superior Court of Mecklenburg County as administrator of the deceased. He has paid all the claims against said estate, and now has in hand for distribution among the persons entitled thereto, the sum of $1,899.50. All persons interested in the due administration of the estate of the said Thomas B. Wallace, have been made parties to this proceeding, which was instituted by the administrator pursuant to the provisions of C. S., 152.

The deceased, Thomas B. Wallace, left no widow or issue surviving him. He left one half-brother, C. B. Cross, and two nephews and one niece, the children of a half-brother, D. B. Cross, who predeceased him. His niece has since died intestate and without issue, leaving surviving her husband. The surviving brother and the children of the deceased brother, living at his death, were entitled to share in the distribution of his personal estate, as his next of kin; C. S., 137, subsec. 5. The husband of the deceased niece, who was living at the death of Thomas B. Wallace, is now entitled to the share in said estate of his deceased wife. C. S., 7.

The deceased, Thomas B. Wallace, had one sister, Bessie Wallace, who died intestate in 1914, leaving surviving one son, Oscar Wallace. At the date of his birth, in 1889, the said Bessie Wallace, was unmarried. The said Oscar Wallace was a bastard child. In 1895, the said Bessie Wallace was married to Charley Edwards.

Oscar Wallace alleged and offered evidence tending to show that Charley Edwards, with whom his mother intermarried, subsequent to his birth, was his reputed father. He contended that from the date of said marriage he has been and is now legitimate in all respects, and that he is, therefore, one of the next of kin of his maternal uncle, Thomas B. Wallace, deceased, and entitled to share with C. B. Cross, and the children of D. B. Cross, deceased, in the distribution of the sum of money now in the hands of the petitioner.

The court was of opinion, that, as a matter of law, conceding that Charley Edwards was the reputed father of Oscar Wallace, as he alleged and offered to prove, and that under the provisions of C. S., 279, Oscar Wallace was legitimate from and after the date of the marriage of his mother to Charley Edwards, and therefore entitled to all the rights in and to the estate, real and personal, of his father and mother, that he would have had had he been born in lawful wedlock, the said Oscar Wallace is not one of the next of kin of Thomas B. Wallace, deceased, and is therefore not entitled to a share in the sum of money now in the hands of his administrator.

From judgment in accordance with this opinion, the respondent, Oscar Wallace, appealed to this Court, contending that there was error in the judgment.

To sustain his contention that at the death of Thomas B. Wallace, he was the legitimate son of Bessie Wallace, the sister of the deceased, and, therefore, one of his next of kin, the appellant, Oscar Wallace, relies upon the provisions of C. S., 279, which is as follows:

"When the mother of any bastard child and the reputed father of such child shall intermarry or shall have intermarried at any time after the birth of such child, the child shall in all respects after such intermarriage be deemed and held to be legitimate and entitled to all the rights in and to the estate, real and personal, of its father and mother that it would have had had it been born in lawful wedlock." (1917, ch. 219, sec. 1.)

This statute was enacted in 1917, subsequent to the marriage of Bessie Wallace, mother of Oscar Wallace, to Charley Edwards, in 1895, and also subsequent to her death in 1914; it was, however, in full force and effect at the death of Thomas B. Wallace in 1927. In *Stewart v. Stewart,* 195 N. C., 476, 142 S. E., 577, we said that the statute, by its express language, is retroactive as well as prospective. We held that a child born out of wedlock, whose mother had intermarried with his reputed father, prior to the enactment of the statute, was the heir of his father, who had died subsequent to its enactment.

The decision in *Stewart v. Stewart,* however, is not determinative of the question presented by this appeal, which is: Does a child born out of wedlock, who by virtue of the statute becomes legitimate upon the subsequent marriage of his mother to his reputed father, and therefore entitled to all the rights in and to the estate, real and personal, of its father and mother, that it would have had had it been born in lawful wedlock, also become an heir and one of the next of kin of a brother or sister of its father or mother, who has died without issue, subsequent to the death of the father or mother?

The answer to this question requires a construction of the statute. While it is provided that the child shall "in all respects be deemed and held to be legitimate," the result of the change in the status of the child, brought about by the marriage of its mother to its reputed father, is declared to be that it "shall be entitled to all the rights in and to the estate, real and personal, of its father and mother, that it would have had, had it been born in lawful wedlock." The statute provides for no other or further result; being in derogation of the common law, it should be construed strictly. We therefore hold that there is no error in the judgment. It is

Affirmed.

CLYDE V. RHODES AND BROADUS RHODES v. NEW YORK LIFE INSURANCE COMPANY.

(Filed 12 June, 1929.)

Removal of Causes A a—Statutory restraint on right to removal unconstitutional and void.

A nonresident insurance company has the right to remove a suit brought against it from the State to the Federal Court under the Federal removal statute, and the State statute, C. S., 6295, providing that upon its attempt to do so the insurance commissioner shall revoke its right to do business in this State is unconstitutional in this respect, and the right to removal obtains notwithstanding that under the statute the company has filed an application to do business in the State waiving its right to removal.

CIVIL ACTION, before *McElroy, J.*, at April Term, 1929, of JACKSON.

Plaintiffs alleged that on 9 October, 1928, the defendant executed and delivered to Jessie C. Rhodes a life insurance policy in which the plaintiffs were named as beneficiaries; that said policy contained a provision that if the insured should die as the result of accidental means and within ninety days after receiving such injury, the defendant would pay to the plaintiffs double the face value of said policy, to wit, $10,000.

It was further alleged that on 5 November, 1928, while said policy was in force, the insured, while handling a pistol, "permitted the same to be accidentally discharged, and by reason thereof caused the death of said Jessie C. Rhodes," the insured.

Thereupon the plaintiffs instituted this action against the defendant to recover the sum of $10,000.

In apt time the defendant filed a petition for removal to the Federal Court, alleging that the defendant was a nonresident of the State of North Carolina.

The plaintiffs filed a reply to the petition for removal, alleging in substance that on 8 April, 1901, the defendant had filed an application to transact business in the State of North Carolina, in which said application the following language appeared: "And said company hereby agrees that suits commenced in the State courts of North Carolina against it shall not be removed by the acts of said company into the United States Circuit or District courts, and that said company will not institute any action or suit in equity in the United States Court against any citizen of North Carolina, growing out of or in any way connected with any policy issued by said company."

The clerk of the Superior Court of Jackson County denied the motion to remove the cause to the Federal Court, and upon appeal to the judge of the Superior Court the order of the clerk was reversed, and the cause removed from the Superior Court of Jackson County to the District Court of the United States for the Western District of North Carolina, from which order of removal the plaintiffs appealed.

A. S. Patterson and Morgan, Ward & Stamey for plaintiffs.
Manly, Hendren & Womble and S. J. Black for defendant.

BROGDEN, J. Is a foreign life insurance company, permitted to transact business in North Carolina by complying with the insurance law, precluded by C. S., 6295, from filing a petition for removal in a pending suit?

On 8 April, 1901, the defendant filed an application to transact business in the State of North Carolina in accordance with the insurance law then in force. The application stated: "And said company hereby agrees that suits commenced in the State courts of North Carolina against it shall not be removed by the acts of said company into the United States Circuit or District courts," etc. This language in the application was designed to comply with the provisions of the statute. C. S., 6295, provides that if any foreign life insurance company shall undertake to remove a pending suit to the Federal Court that the Insurance Commissioner shall revoke the authority to transact business in this State. The statute was construed in the case of *Insurance Co. v. Commissioner,* 144 N. C., 442, 57 S. E., 120, and held constitutional. The decision was planted squarely upon the authority of *Insurance Co. v. Prewitt,* 202 U. S., 246, 50 L. Ed., 1013. However, the *Prewitt case* was expressly overruled in *Terral v. Burke Construction Co.,* 257 U. S., 529, 66 L. Ed., 352. *Chief Justice Taft,* writing for the Court, said: "The principle established by the more recent decisions of this Court is that a state may not, in imposing conditions upon the privilege of a foreign corporation's doing business in the state, exact from it a waiver of the exercise of such right, whether waived in advance or not. The principle does not depend for its application on the character of the business the corporation does, whether state or interstate, although that has been suggested as a distinction in some cases. It rests on the ground that the Federal Constitution confers upon citizens of one state the right to resort to Federal Courts in another; that state action, whether legislative or executive, necessarily calculated to curtail the free exercise of right thus secured, is void because the sovereign power of a state in excluding foreign corporations, as in the exercise of all others of its sovereign powers, is subject to the limitations of the supreme fundamental law." *Fidelity & Deposit Co., v. Tafoya,* 270 U. S., 426, 70 L. Ed., 634; *Frost v. R. R. Commission,* 271 U. S., 583, 70 L. Ed., 1101; *Hanover Fire Ins. Co. v. Carr,* 272 U. S., 494, 21 A. L. R., 188.

It is clear therefore that the removal provisions of C. S., 6295, is unconstitutional and void. Hence the defendant had a right to remove the case, and the judgment of the Superior Court is

Affirmed.

F. R. HEMPHILL v. STANDARD OIL COMPANY.

(Filed 12 June, 1929.)

1. **Master and Servant C c—In this case held, evidence of master's negligence in failing to furnish reasonable help held insufficient.**

   Upon evidence tending to show only that the defendant's driver of its truck was sent to defendant's filling station to load a heavy pump on the truck, and that usually there was sufficient help, but that on this occasion, without the knowledge of the employer, there was no help, and without using the available method of communicating the fact by telephone to the employer, the plaintiff assumed to load the pump without help: *Held,* the evidence is insufficient upon which the plaintiff could recover damages for the consequent injury upon the ground that the defendant had failed in its duty to supply sufficient help, and defendant's motion for judgment as of nonsuit should have been allowed.

2. **Master and Servant C b—Evidence of master's negligence in failing to provide sufficient heat in office where plaintiff was required to work held insufficient.**

   Where the plaintiff demands judgment for the defendant's failure to have properly heated a small office in which he was sometimes required to work at night, and the plaintiff had furnished an oil stove and oil to heat the office, and the defendant continued his employment without complaint to or knowledge of the employer of the insufficiency, the evidence is insufficient to sustain a verdict adverse to the defendant upon the issues of negligence, contributory negligence and assumption of risks, and defendant's motion as of nonsuit should have been allowed.

APPEAL by defendant from *Lyon, Emergency Judge,* at October Term, 1928, of BURKE. Reversed.

Action to recover damages for personal injuries alleged to have been sustained by plaintiff, while at work as an employee of defendant.

Plaintiff alleged in his complaint that the proximate cause of the injuries which he sustained was the failure and neglect of defendant (1) to furnish him necessary, proper and sufficient help and assistance to do and perform the work required of him, and (2) to provide for proper and sufficient heat in the office when plaintiff was required to work at night. These allegations were denied by defendant, who relied further upon its pleas that plaintiff had by his own negligence contributed to his injuries, if any, and that he had voluntarily assumed the risk of such injuries when he accepted employment by defendant.

Issues submitted to the jury were answered as follows:

1. Was the plaintiff, Ralph Hemphill, injured by the negligence of the defendant, Standard Oil Company, as alleged in the complaint? Answer: Yes.

2. Did the plaintiff, Ralph Hemphill, by his own negligence, contribute to his injury, as alleged in the answer? Answer: No.

3. Did the plaintiff, Ralph Hemphill, voluntarily assume the risk as alleged in the answer? Answer: No.

4. What damages, if any, is the plaintiff, Ralph Hemphill, entitled to recover of the defendant, Standard Oil Company? Answer: $2,500.

From judgment in accordance with the verdict defendant appealed to the Supreme Court.

Avery & Patton and John M. Mull for plaintiff.
S. J. Ervin and S. J. Ervin, Jr., for defendant.

CONNOR, J. Upon consideration of the evidence offered at the trial of this action, as set out in the case on appeal, we are of the opinion that there was error in the refusal of the trial court to allow defendant's motion for judgment as of nonsuit, at the close of all the evidence. C. S., 567. There was no evidence tending to show that defendant was negligent as alleged in the complaint, but conceding that there was such evidence, all the evidence tends to show that plaintiff, by his own negligence, contributed to the injuries which he testified that he has sustained, and that plaintiff, when he accepted employment by defendant, assumed the risk of such injuries. Defendant's motion should have been allowed, and the action dismissed.

Plaintiff was employed by defendant as a truck-driver, and helper. He was about 20 years of age, and in good physical condition, at the time he was employed. On the occasion when he contends that he was injured, plaintiff had been ordered and directed by his superior to take his truck to a filling station, near Hickory, N. C., and to bring from the filling station to Hickory, a pump, which he testified weighed between 800 and 1,000 pounds. When plaintiff arrived at the filling station there was no one there to load the pump on the truck, or to aid him to do so. There was usually a sufficient number of men, employees at the station, to load a pump such as plaintiff had been ordered and directed to bring on his truck to Hickory, whose duty it was to load, or help load the pump. Plaintiff had been instructed by his superior on previous occasions to call on these men for help.

When plaintiff arrived at the filling station, and found no one there to aid him, he waited for thirty minutes for help. There was telephone connection between the station and the office of plaintiff's superior, under whose orders he was acting. Plaintiff did not telephone to his superior, or otherwise inform him that there was no one at the station to help him load the pump on the truck. He undertook to load the pump alone and without assistance. He testified that as a result of his lifting the heavy pump, and loading it on the truck, he strained his back and neck. He did not suffer from his injuries until that night. He continued to work for defendant for several months, without complaint to his superior or to the defendant, and then voluntarily left the defendant's employment.

Some time in June, 1928, plaintiff was ordered and directed by defendant to go to Newton, N. C., as an assistant to defendant's agent at that place. While working for defendant at Newton from June to December, plaintiff was required to work in a small office, sometimes at night. During the winter defendant provided a small oil stove for heating this office. Oil and matches were provided by defendant. Plaintiff testified that the office was sometimes cold and that he suffered severe colds because the office was not sufficiently heated by the oil stove. There was no evidence that plaintiff at any time made complaint to defendant or to his superior that the office was not comfortable, or that the oil stove was not adequate for the purpose of heating the office on cold days and nights.

The principles which control the decision of the question presented by this appeal are stated and discussed by *Brogden, J.,* in *Jarvis v. Cotton Mills,* 194 N. C., 687, 140 S. E., 602. Upon the facts which all the evidence in this case tends to show, defendant is not liable to plaintiff, and the judgment must be

Reversed.

MYRTLE A. McDANIEL v. TRENT MILLS, INC.

(Filed 12 June, 1929.)

1. **Husband and Wife B c—Wife may recover moneys expended by her by reason of negligent injury to husband in her action against tort-feasor.**

   A wife may recover from one who has negligently injured her husband such moneys as she has been required to pay from her separate estate by reason of his sickness or incapacity so caused, but she may not recover for nursing him, or loss of consortium, or mental anguish, or loss of support and maintenance, or for damages he or his personal representative might recover in an action against the *tort-feasor.*

2. **Pleadings D e—Demurrer admits allegations of complaint.**

   A demurrer to a complaint on the grounds that a cause of action is not stated therein merely tests its sufficiency to allege a good cause of action, and admits the truth of its allegations for the purposes of the demurrer.

CONNOR, J., dissents.

APPEAL by defendant from *Daniels, J.,* at Chambers, New Bern, N. C., 15 February, 1929. From JONES.

Civil action, brought by plaintiff, wife of C. S. McDaniel, in her own right, to recover damages alleged to have been sustained by her as a proximate result of the negligence of the defendant in inflicting serious and permanent injuries upon her husband while he was engaged in the discharge of his duties as an employee of the defendant.

Plaintiff alleges that she was living with her husband at the time of his injury; that she has continued to live with him ever since; and that in consequence of the defendant's negligence, which caused serious and permanent injury to her husband, she has suffered damages as follows (1) Heavy expenses incurred and paid by her, made necessary by her husband's injuries; (2) services performed in nursing and caring for him; (3) loss of support and maintenance; (4) loss of consortium; (5) mental anguish.

A demurrer was interposed by the defendant upon the ground that the complaint does not state facts sufficient to constitute a cause of action, and that in reality no cause of action exists in favor of the plaintiff and against the defendant.

From a judgment overruling the demurrer the defendant appeals, assigning error.

McKinnon Carmichael and Warren & Warren for plaintiff.
J. Laurence Jones and Guion & Guion for defendant.

Stacy, C. J. The appeal presents the single question as to whether a wife, who is living with her husband, can maintain an action, in her own right, for damages of any kind, alleged to have been sustained by her, on account of serious and permanent injuries negligently inflicted upon her husband by a third party. We think so. *Hinnant v. Power Co.,* 189 N. C., 120, 126 S. E., 307; *Hipp v. Dupont,* 182 N. C., 9, 108 S. E., 318.

But she can recover nothing in her own right which her husband could recover or which his personal representatives could recover in case his death resulted from the injury. *Hipp v. Dupont, supra.*

Nor can she recover for services performed by her in nursing and caring for her husband *(Chicago, etc., Transit Co. v. Moore,* 259 Fed., 490); or for loss of consortium or mental anguish *(Hinnant v. Power Co., supra);* or for loss of support and maintenance *(Craig v. Lumber Co.,* 189 N. C., 137, 126 S. E., 312).

But when a wife, living with her husband, has been impelled, through the natural and ordinary considerations of family life, to expend money out of her own personal estate, as a proximate result of a negligent injury inflicted upon her husband by a third person, and for which neither he nor his personal representatives can recover, as plaintiff alleges in the instant case, we see no valid reason for holding, as against a demurrer, that the complaint does not state facts sufficient to constitute a cause of action in plaintiff's favor and against the *tort-feasor. Hipp v. Dupont, supra.* The family in its integrity has been the foundation, as well as the bulwark, of American institutions from the beginning of our history. In fact, it is the very cradle of civilization, with the future welfare of the commonwealth dependent, in large measure, upon the success of its administration. Hence, when a wife, under such impulsion and in obedience to its command, comes to the aid of her husband with the expenditure of her separate funds, she is not to be regarded as a volunteer, but as one acting within her conjugal rights, and it is but meet that, under such circumstances, the wrongdoer, who has forced her to part with her means, should respond in damages to the extent of the reasonable obligations thus assumed and paid by her as a direct result of his tortious acts.

While the common-law principle of unity of husband and wife and the modern doctrine of complete duality of personalities may clash somewhat in yielding to this result, still, we think, the conclusion is supported by the logic of life, if not by the logic of syllogism; and it should be remembered that law is bigger than logic, life is bigger than law, and the function of judicial decision is to state, as near as possible, in terms of law, the meaning of life in action. This middle course, as it may be called, is perhaps a hybrid between the old and the new doctrines just mentioned, or a mixture of the two, but, if so, it comes from holding fast to that which is good in the old and pressing forward to that which is helpful in the new, a practice heretofore commended by an authority on domestic relations, a great lawyer, and one of the apostles.

We are not now concerned with whether the plaintiff can make good her allegations with proof. The case is here on demurrer, the office of which is to test the sufficiency of the complaint, admitting, for the purpose, the truth of the allegations of fact contained therein. *Brick Co. v. Gentry,* 191 N. C., 636, 132 S. E., 800; *Justice v. Sherard, ante,* 237.

Affirmed.

CONNOR, J., dissents.

FRANK COXE v. JAMES C. DILLARD, JOSEPH A. JOHNSON, AND W. B. TROY.

(Filed 12 June, 1929.)

1. **Pleadings D a—In this case held, cause of action was stated against all parties defendant.**

   A complaint alleging that the plaintiff at the request and for the convenience of the defendants made a deed to a certain tract of land to one of them for the benefit of them all in which the grantee assumes the obligation of a prior mortgage for them all, and that the grantee defendant subsequently conveyed to the other defendants upon like condition their proportionate share, specifying the interest of each, states a cause of action as to each, and a demurrer thereto, on the grounds of misjoinder of parties and causes of action and that it fails to allege a cause of action, admits the truth of the allegations, and is properly overruled.

2. **Frauds, Statute of A a—Where parties assume debt on lands deeded to another for them, they have a pecuniary interest therein and the Statute does not apply.**

   Where a grantor makes deed to one of the defendants for the benefit of the others, at their request and for their convenience, and a prior mortgage debt is assumed by the grantee therein, who later makes a deed to the other defendants in which the prior mortgage was assumed by them: *Held,* in the original grantor's action on the mortgage debt to recover against the defendants for whose benefit the grantee defendant took title, the statute of frauds does not apply since each of the defendants had a pecuniary interest in the transaction. C. S., 987.

3. **Deeds and Conveyances C f—Grantee in deed is bound by covenants therein although he does not sign or execute the deed.**

The grantee in a deed containing covenants and stipulations purporting to bind him becomes bound for their performance even though he does not execute the deed, and where a grantee of lands assumes a prior mortgage thereon he is bound thereby without signing the deed.

CIVIL ACTION, before *Schenck, J.*, at February Term, 1929, of BUNCOMBE.

Plaintiff alleged that J. W. Keys owned a tract of land in the city of Asheville and sold a one-half-undivided interest therein to him prior to 14 December, 1925, and that in order to secure the balance of the purchase price, plaintiff executed and delivered to said Keys his promissory notes aggregating $10,250, and securing said notes by a mortgage upon the land; that the sum of $3,750 has been paid on said indebtedness, leaving a balance due of $6,500.

Plaintiff further alleged that on 26 February, 1926, he sold his undivided interest in said land to L. E. Sorrell, W. L. Harrell, J. C. Dillard, Joseph A. Johnson and W. B. Troy, "and for the purpose of convenience to the parties purchasing the same and at their request the deed to said property was made to L. E. Sorrell," etc. Sorrell executed and delivered to the plaintiff three promissory notes aggregating $20,700, "and as a part of the consideration the said above-named parties assumed and agreed to pay the sum of $6,500 then owing to the said J. W. Keys and wife," etc. That on the same day, to wit, 26 February, 1926, Sorrell executed and delivered a deed to the said W. L. Harrell, J. C. Dillard, Joseph A. Johnson and W. B. Troy, in which said deed the following provisions appeared:

(a) "The above-described property being conveyed hereby to the parties of the second part in the following proportional interests: To W. L. Harrell one-ninth; Joseph A. Johnson two-ninths; J. C. Dillard two-ninths, and W. B. Troy two-ninths."

(b) "Except the sum of $27,200, which said indebtedness the parties of the second part hereby agree and assume and agree to pay in proportion to their said interest in said land and premises above set forth."

It will be observed that the said sum of $27,200 included the $6,500 indebtedness due Keys and the $20,700 due plaintiff.

Plaintiff further alleged that the defendants failed to pay the indebtedness due Keys. Whereupon Keys advertised the property and sold it at public auction, the plaintiff becoming the purchaser thereof for the sum of $1,000. Whereupon plaintiff prayed judgment against the defendants upon the notes amounting to $20,700 executed and delivered to him and the deficiency upon the Keys notes, the whole aggregating $27,816. The defendants, Dillard and Johnson, demurred to the complaint upon the ground that there was a misjoinder of parties and causes of action, and that the complaint did not state facts sufficient to constitute a cause of action.

The trial judge overruled the demurrer and the defendants appealed.

Lee, Ford & Coxe for plaintiff.
Joseph W. Little for defendants.

BROGDEN, J. The plaintiff alleged that the land was sold to the defendants, but that the deed was made to L. E. Sorrell for their convenience and at their request. The demurrer admits this allegation. Hence Sorrell was merely holding the title to the land for the use and benefit of the defendants.

Plaintiff further alleged that Sorrell conveyed the property to the defendants by a deed containing a covenant according to the terms of which the defendants agreed to pay the indebtedness described in the complaint. The demurrer admits this allegation.

Upon this state of the record the trial judge was fully justified in overruling the demurrer.

Defendants, however, insist that the notes in controversy were signed not by them, but by Sorrell and plaintiff, Coxe, and that therefore they cannot be held upon an oral promise to answer for the debt or default of another under the provisions of C. S., 987.

This position cannot be maintained for two reasons:

First, it appears from the complaint that the land was purchased by Sorrell for the use and benefit of defendants. Hence the defendants had a personal and pecuniary interest in the transaction, and the statute of fraud would not apply. *Dale v. Lumber Co.*, 152 N. C., 651, 68 S. E., 134; *Peele v. Powell,* 156 N. C., 554; 73 S. E., 234; *Powell v. Lumber Co.,* 168 N. C., 632, 84 S. E., 1032; *Springs v. Cole,* 171 N. C., 418, 88 S. E., 721; *Kelly Handle Co. v. Crawford Plumbing Co.,* 171 N. C., 495, 88 S. E., 514. See, also, *Keller v. Parrish,* 196 N. C., 733, and *Justice v. Sherard, ante,* 237.

Second, it further appears that the defendants received a deed for their proportional interests in the land in which said deed it was agreed that they would assume and pay off the indebtedness described in the complaint. The grantee in a deed containing covenants and stipulations purporting to bind him becomes bound for their performance even though he does not execute the deed. *Peel v. Peel,* 196 N. C., 782.

Affirmed.

IN RE WILL OF JOHN E. CASEY.

(Filed 12 June, 1929.)

Wills D h—Evidence in this case on question of mental capacity held competent.

Upon the trial of the issues of *devisavit vel non* it is competent for the disinherited child of the testator to testify as to her financial condition, the fact of disinheritance, and affectionate relationship between her and the testator upon the question of the mental capacity of the testator.

CIVIL ACTION, before *McElroy, J.*, at October Term, 1928, of BUNCOMBE.

The evidence tended to show that on 6 May, 1922, John E. Casey executed a last will and testament devising all of his property to his widow for life, and after her death one-third thereof to Mollie Harris, one-third to his granddaughter, Ella Reed, and one-third to his great-granddaughter, Annie Morrow, and his great-grandson, Broadhurst Morrow. The testator died on 25 November, 1925.

The caveators are Emma Connor, the only living daughter of the testator, and J. R. Dotson, grandson, and Minnie Gregory, great-granddaughter of the deceased. Emma Connor, daughter of the deceased, received one dollar under the will of her father, and the other caveator, Minnie Gregory, received one dollar, and the caveator, Dotson, received nothing.

Appropriate issues were submitted to the jury and answered in favor of the propounders.

From judgment upon the verdict caveators appealed, assigning error.

Galloway & Galloway and R. N. Wells for caveators.
Marcus Erwin and Anderson & Howell for propounders.

BROGDEN, J. Emma Connor, one of the caveators, and the only living child of the testator, was asked the following questions:

1. "What property have you now?"

2. "Did you get anything by the last will and testament of John E. Casey?"

3. "How did your father treat you with reference to his treatment of your other sister while you were young?"

The witness answered the first question "None"; the second question "No"; and the third question, "I never had any trouble with my father."

All of these questions were objected to by the propounders and the answers of the witness were stricken out, and the caveators excepted and assigned the ruling of the court as error. These exceptions constitute exceptions 1, 2 and 3, and present three questions of law, to wit:

1. Is the financial condition of a child excluded from the will of the father competent upon the issue of mental capacity?

The law answers this question in the affirmative. *In re Staub's Will*, 172 N. C., 138, 90 S. E., 119; *In re Hinton's Will*, 180 N. C., 206, 104 S. E., 341; *In re Stephen's Will*, 189 N. C., 267, 126 S. E., 738.

Such evidence is also competent upon the issue of undue influence. *In re Creecy*, 190 N. C., 301, 129 S. E., 822.

2. Is the disinheritance of a child competent evidence upon the question of mental capacity?

The law answers this question in the affirmative. *In re Hinton's Will*, 180 N. C., 206, 104 S. E., 341.

3. Is evidence of kindly and affectionate relationship between the testator and the members of his family competent upon the issue of mental capacity?

The law answers this question in the affirmative. *Bost v. Bost*, 87 N. C., 477; *In re Burns' Will*, 121 N. C., 336, 28 S. E., 519.

Therefore the exclusion of testimony was error, and the caveators are entitled to a

New trial.

SADIE AND HOWARD PIERCE, BY THEIR NEXT FRIEND, R. C. SCHULKEN, v. ARCHIE T. PIERCE AND ROYAL INDEMNITY COMPANY.

(Filed 12 June, 1929.)

Guardian and Ward C a—Guardian not liable for loss to estate of ward when he has exercised good faith and due diligence.

The liability of a guardian and the surety on his bond for a loss to the estate of the ward caused by the failure of a bank in which the guardian kept deposits of the estate, does not attach when it is found that the guardian exercised good faith and due diligence, and the refusal of the trial court to substantially submit this issue to the jury under the evidence in this case is reversible error.

APPEAL by defendant, Royal Indemnity Company, from *Cranmer, J.*, at November Term, 1928, of COLUMBUS. New trial.

Action to recover of a guardian and the surety on his bond the amount due his wards.

The issues submitted to the jury were answered as follows:

1. What amount, if any, are plaintiffs entitled to recover of the defendants? Answer: $206.30, with interest.

2. What amount, if any, is the Royal Indemnity Company entitled to recover of Archie T. Pierce? Answer: $206.30, with interest.

From judgment on the verdict, the defendant, Royal Indemnity Company, appealed to the Supreme Court.

Greer & Bennett for plaintiffs.
Isaac C. Wright for defendant company.

CONNOR, J. On 5 November, 1923, the defendant, Archie T. Pierce, was appointed by the clerk of the Superior Court of Columbus County, North Carolina, guardian of the plaintiffs, his infant children. As such guardian, he filed a bond, in the form required by statute (C. S., 2162), which the defendant, Royal Indemnity Company, had executed as surety. C. S., 339. The penalty of said bond is $750. The bond was approved by the clerk, and the defendant, Archie T. Pierce, as guardian of plaintiffs thereafter received the sum of $333.33, in cash, which he deposited in the Bank of Columbus, of Whiteville, N. C.

There was an agreement between the guardian and his surety that said deposit should be under their joint control, and that checks on said deposit should be approved and countersigned by an agent of the surety. Checks were drawn on said deposit, from time to time, for amounts properly expended by the guardian for his wards. Accounts filed by the guardian, from time to time, showing that the money due the plaintiffs by their guardian was deposited in said Bank of Columbus, were audited, approved and recorded by the clerk of the Superior Court.

On 31 January, 1927, the Bank of Columbus was adjudged insolvent. It has ceased to do business. Its assets are not sufficient for the payment in full of its liabilities.

On 7 March, 1927, the defendant, Archie T. Pierce, guardian of plaintiffs, filed an account with the clerk of the court, showing that the balance in his hands due his wards, on said date, was $257.31. He reported to the clerk that he was unable to replace the amount which he had lost by the insolvency of the Bank of Columbus, and prayed that he be released from liability to his wards. His prayer was refused by the clerk, who, however, made an order, discharging the said Archie T. Pierce as guardian of the plaintiffs. Thereafter, this action was begun by plaintiffs, appearing by their duly appointed next friend, to recover of defendants the amount due them.

At the trial, defendant, Royal Indemnity Company, tendered an issue as follows:

"4. Did the defendant, Archie T. Pierce, exercise reasonable diligence and good faith in the handling of the guardianship funds?"

The court declined to submit this issue, and said defendant duly excepted. Its assignment of error based on this exception is sustained. The issue arises upon the pleadings; there was evidence tending to support the defense relied upon by the surety. The refusal to submit this issue was error, for which the appellant is entitled to a new trial. In *Sheets v. Tobacco Co.,* 195 N. C., 149, 141 S. E., 355, we said: "Good faith and due diligence on the part of the guardian, however, will protect the guardian and the sureties on his bond, from liability for losses."

If, upon the new trial, the issue tendered by defendant, Royal Indemnity Company, be answered in the affirmative, the plaintiffs will not be entitled to recover in this action. There are other assignments of error on this appeal which need not be considered at this time as there must be a

New trial.

STATE v. BAXTER STANSBERRY.

(Filed 12 June, 1929.)

1. **Appeal and Error E g—Record conclusive on appeal.**

   On appeal the Supreme Court is bound by the record as it is sent up.

2. **Criminal Law I g—Instructions on aspect of case not supported by evidence held reversible error.**

   Evidence which tends only to show that a male person over eighteen years of age met the prosecuting witness on her way to a spring near a school she was attending, and that he caught her by the arms for a moment and then released her, using no improper language, and that she was then afraid to continue her way to the spring because she did not know "who all was over there" without testimony that the defendant caused her not to go to the spring is insufficient to support an instruction that if, under the circumstances, the prosecuting witness left the place where she had a right to be, or did not go to the spring by reason of the defendant's putting her in fear, the defendant would be guilty under the provisions of C. S., 4215, is reversible error, and a new trial will be awarded.

APPEAL by defendant from *Moore, J.,* at November Term, 1928, of CHEROKEE.

Criminal prosecution tried upon an indictment charging that the defendant did, on 5 November, 1928, with force and arms, assault, beat and wound one Beula Kilpatrick, a female, the defendant being, at the time, a male person over eighteen years of age. C. S., 4215.

It is not right clear from the record as to what took place in this case. But it seems that in August, 1928, four young girls, Annie Lee

Davis, her sister, Alice Davis, Polly Woody and the prosecuting witness, Beula Kilpatrick, all students at Marble, N. C., and each about fifteen years of age, were on their way to a spring, not far distant from the school, when they met four young men, Jud Stansberry, W. G. Griggs, Forest Abernathy and the defendant, Baxter Stansberry. The boys were apparently known to the girls; they had seen them before. It seems that the Davis girls and Griggs live within a half mile of each other.

The substance of Beula Kilpatrick's testimony is, that while they "were all around there, all together, standing in the trail that leads to the spring, Baxter Stansberry caught hold of my arm. I told him to turn me loose. He did not turn me loose when I told him to. I jerked loose and ran back to the schoolhouse. I was afraid to go to the spring because I didn't know who all was over there. He didn't say anything at all out of the way to me, not a word. When he took hold of me I stood still. The others had gone on but they were not out of my sight. Annie Lee Davis got back to the schoolhouse when I did."

The trial court instructed the jury, among other things, that if the prosecuting witness "left the place where she had a right to be, or did not go to the spring by reason of his putting her in fear, or she was put in fear by reason of the defendant's conduct, that would be an assault, and if you so find beyond a reasonable doubt, it would be your duty to convict the defendant." Exception.

Verdict: "Guilty of the charge."

Judgment: Two years on the roads.

Defendant appeals, assigning errors.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

J. D. Mallonee and Moody & Moody for defendant.

STACY, C. J. The trial court evidently had more facts before it than appear in the agreed case on appeal. But we are bound by the record as it is sent up. *S. v. Harbert,* 185 N. C., 760, 118 S. E., 6.

Conceding that the evidence may be sufficient to carry the case to the jury on the theory of an assault and battery (*S. v. Hemphill,* 162 N. C., 632, 78 S. E., 167), still we think the trial court erred in submitting it on the assumption that sufficient show of force or threat of violence had been offered by the defendant to put the prosecutrix in fear and thereby cause her to leave from where she was, or to desist from going to the spring. She does not say that the defendant's conduct was the cause of her leaving or going back to the schoolhouse. Nor does she say that she was put in fear by him. On the other hand, she says she was afraid to go to the spring because she did not know "who all was over there." The defendant said nothing, not a word, out of the way to the prosecuting witness. *S. v. Daniel,* 136 N. C., 571, 48 S. E., 544.

On the record as presented, the defendant is entitled to have the judgment vacated and a new trial awarded. It is so ordered.

New trial.

STATE v. WILBURN GRIGGS.

(Filed 12 June, 1929.)

1. **Appeal and Error E g—Record conclusive on appeal.**

On appeal the Supreme Court is bound by the record as it is sent up.

2. **Criminal Law I g—Instruction in this case held reversible error as expression of opinion by the court.**

An instruction upon a vital question at issue on the trial of an assault of a male person over eighteen years of age upon a female, C. S., 4215, which assumes the fact at issue is reversible error.

APPEAL by defendant from *Moore, J.,* at November Term, 1928, of CHEROKEE.

Criminal prosecution tried upon an indictment charging that the defendant did, on 5 November, 1928, with force and arms, assault, beat and wound one Annie Lee Davis, a female, the defendant being, at the time, a male person over eighteen years of age. C. S., 4215.

This is a companion case to *S. v. Baxter Stansberry, ante,* 350, as the two cases grow out of the same general surroundings, though there is more evidence of an assault in the present case than in the other one.

Here, the prosecuting witness testified that the defendant caught her around the waist, called her "little blue eyes," and carried her down the hill thirty or forty feet. This was denied in *toto* by the defendant, who said that he was on his way with Forest Abernathy to look at a house, which Abernathy's father had purchased, and to lock it up, when they met the girls on the way to the spring.

The following excerpt, taken from the charge, constitutes one of the defendant's exceptive assignments of error:

"There is no evidence anywhere, gentlemen, that they went on to the house to look at it or to lock it up, but they stopped near the spring, and then these girls came along and they all got to talking there, but none of the other cases are before you now, gentlemen, but the defendant Griggs who took the little girl off as I have described to you into the woods." Exception No. 2.

Verdict: "Guilty of the charge as to Wilburn Griggs."

Judgment: Two years on the roads.

Defendant appeals, assigning errors.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

J. D. Mallonee and Moody & Moody for defendant.

STACY, C. J. It would appear that the instruction which constitutes the defendant's second exceptive assignment of error, above set out, contains an inadvertent expression of opinion, prohibited by C. S., 564, to the effect that the defendant had taken the little girl off into the woods, when this was the crucial point in the case and strongly denied by the defendant. *S. v. Hart,* 186 N. C., 582, 120 S. E., 345; *Speed v. Perry,* 167 N. C., 122, 83 S. E., 176. The error is just one of those casualties which, now and then, befalls the most circumspect in the trial of causes on the circuit. *S. v. Allen,* 190 N. C., 498, 130 S. E., 163; *S. v. Kline,* 190 N. C., 177, 129 S. E., 417. Indeed, the case on appeal was not settled by the judge, and it is possible that the charge, as reported, is not as given, but we are bound by the record. *S. v. Harbert,* 185 N. C., 760, 118 S. E., 6; *S. v. Wheeler,* 185 N. C., 670, 116 S. E., 413; *Cogdill v. Hardwood Co.,* 194 N. C., 745, 140 S. E., 732.

For the error as indicated, a new trial must be awarded, and it is so ordered.

New trial.

C. H. HAMILTON, COMMISSIONER, v. R. H. HENDERSON.

(Filed 12 June, 1929.)

Parties B b—Heirs of grantor of deed providing for reversion are necessary parties in action by grantee's heir to enforce contract of sale thereof.

An estate for life conveyed by deed upon conditions affecting a reversion cannot be judicially determined when the heirs at law of the deceased grantor having a possible interest therein are not made parties, and when this defect of parties appears on the record the Supreme Court will remand the case in order that they may be joined.

CIVIL ACTION, before *Harding, J.,* at November Term, 1928, of MECKLENBURG.

On 14 November, 1884, R. M. Armour and wife conveyed a certain tract of land to Stanford Holdsclaw and wife. After describing the land so conveyed the following language occurs in the deed: "To have and to hold the aforesaid lot with all the appurtenances thereto belonging, including the right of dower of the said L. C. Armour *(feme covert)* to the said Stanford Holdsclaw and wife during their natural life and the parties of the second part hereby agree not to dispose of said lot to any one except the parties of the first part, or by their consent or their heirs' consent.

And it is further agreed that at the decease of the parties of the second part that the title of said lot shall revert to the parties of the first part, their heirs, executors and assigns, they paying a fair price for the same.

In witness whereof, the parties of both parts have hereunto set their hands and seals, this 14 November, 1884." R. M. Armour, L. C. Armour, Stanford Holdsclaw, Hannah Holdsclaw.

L. C. Armour, wife of one of the grantors, died in 1891, and R. M. Armour, the other grantor, died in July, 1913. Stanford Holdsclaw died in 1913, and thereafter his wife, Hannah Holdsclaw, died intestate, leaving two sons, to wit, Walter Johnson and Will Houser. Walter Johnson died intestate in 1918, leaving a widow, Ida Johnson, and the following children, to wit: Walter Johnson, Parks Johnson, Willie May Johnson, Harry Lee Johnson and Bernard Johnson. Will Houser died in 1923, intestate, leaving a widow but no child or the representative of any child.

It was admitted that the land had been "in the adverse, open and non-disputed possession of the heirs at law of Hannah Holdsclaw since .... October, 1913."

The above named heirs at law of Walter Johnson and his widow filed a petition in the Superior Court for the sale of said land for division, and the plaintiff Hamilton was appointed commissioner to make the sale. The sale was made on 4 July, 1927, and the defendant Henderson became the last and highest bidder for the land. When the plaintiff tendered a deed for said property to the defendant he declined to accept the deed and pay the purchase money upon the ground that said deed could not and did not convey a good title. The trial judge decreed that "Hannah Holdsclaw had only a life estate in the land described in the deed, and that at the death of said defendants, Holdsclaw and wife, Hannah Holdsclaw, the property reverted to R. M. Armour or his heirs at law, "they paying a fair price for the same," from which judgment the plaintiff appealed.

Z. V. Turlington for plaintiff.
No counsel for defendant.

BROGDEN, J. It appears that the heirs at law of the grantors have not been made parties to this action, and therefore their rights, if any, cannot be determined unless they are brought into court and afforded an opportunity to assert any claim they may have. The cause is remanded to the end that the heirs at law of the grantors may be duly made parties to the proceeding.

Remanded.

ED CHAMBERS SMITH v. ARTHUR E. DICKS.

(Filed 12 June, 1929.)

1. **Corporations K d—Upon expiration of charter of corporation assets thereof do not escheat.**

Upon the expiration of the charter of a corporation the directors thereof hold the assets as trustees, first for the creditors, and secondarily for the stockholders in good standing at the time of the expiration of the charter, C. S., 1193, 1194, 1198, and there is no escheat as against the rights of stockholders under the provisions of C. S., 5784.

2. **Same—Stockholders at time of expiration of charter of corporation are entitled to pro rata part of corporate assets.**

Where an incorporated social club has continued for more than three years after the expiration of its charter to operate as though the charter had not expired, the members or stockholders in good standing at the time of the expiration of the charter are entitled in equity to a pro rata share in the assets of the corporation to the exclusion of members taken in after its expiration, with the right to sell and convey the same, where the rights of creditors are not involved.

3. **Same—Nonresident members of social corporation, excluded from control or ownership of corporate property, are not entitled to share in corporate assets upon dissolution.**

Where the constitution and by-laws of an incorporated social club clearly provide that its property should be owned and controlled by its resident membership to the exclusion of nonresident members, such nonresident members, taken in at greatly reduced membership dues, are not entitled to share in the assets of the corporation upon the expiration of its charter.

APPEAL by defendant from *Nunn, J.*, at Chambers, 29 April, 1929, of WAKE. Affirmed.

Submission of controversy without action. Agreed case:

"1. The above named, Ed Chambers Smith, is now and was at the times hereinafter mentioned, a citizen and resident of the county of Wake and State of North Carolina.

"2. That the above named, Arthur E. Dicks, is a citizen and resident of the county of Wake, and State of North Carolina.

"3. That on 18 August, 1885, the Capital Club of the city of Raleigh was organized, and incorporated for literary and social purposes, and obtained a charter under the laws of the State of North Carolina, and in pursuance of said purposes maintained a club for its members, governed by a constitution and by-laws adopted by said Capital Club of the city of Raleigh, and that a copy of said charter, constitution and by-laws is hereto attached marked Exhibits A, B and C, respectively. (For a decision of the case it is unnecessary to include the exhibits in this opinion.)

"4. That the said Capital Club of the city of Raleigh was chartered for a period of thirty years from 18 August, 1885.

"5. That on .... June, 1902, the Capital Club of the city of Raleigh acquired by purchase a certain lot of land in the city of Raleigh, N. C., at the northeast intersection of Martin and Salisbury streets, and erected thereon a club house, said tract or lot of land being more particularly described as follows:

" 'Situate in the city of Raleigh, N. C., and beginning at the southwest corner of Lot No. 115, it being the northeast corner of intersection of Salisbury and Martin streets; running thence north along the east line of Salisbury Street about 70 feet to the southwest corner of the lot formerly owned by B. M. Moore; running thence east parallel with Martin Street about 70 feet to the lot formerly owned by the Coley heirs, and now owned by Mrs. F. P. Tucker; running thence south parallel with Salisbury Street 70 feet to the line of Martin Street; thence west along the north line of Martin Street, about 70 feet, to the beginning, together with all buildings and appurtenances thereto belonging.'

"6. That the charter of the Capital Club of the city of Raleigh expired by limitation on 18 August, 1915, at which time there were 168 resident members of said club and about 40 nonresident members; that the fact of the expiration of the charter was not discovered by the club until sometime in 1922; that in the meantime those who were members of the corporation at the time of the expiration of the charter, being ignorant of the fact that the charter had expired, continued to operate a club in said building, until some time in 1922, when it was discovered that the charter had expired and thereupon, on 7 April, 1922, a charter was obtained from the office of the Secretary of State, incorporating the Capital Club of the city of Raleigh, Inc., the then resident members of the club being the incorporators. That during the time between the expiration of the charter of the old corporation and the incorporation of the Capital Club of Raleigh, Inc., the old members who operated the club, associated with themselves certain new members by election and between the date of 18 August, 1915, and 18 August, 1918, approximately 30 additional members were so admitted, making the membership 198 resident members on 18 August, 1918. That no conveyance of any interest in the property was made by any old member to any new member.

"7. That no effort was made to wind up the affairs of the corporation within three years from the date of the expiration of the charter, none of its officers and members being aware of the fact that the charter had expired. Those who were members of the corporation continued the operation of the club, and associated new members with them by election just as if the charter had not expired.

"8. That there were no debts of the corporation at the time of the expiration of its charter on 18 August, 1915, or at the end of three years from that date, except current operating expenses and a mortgage indebtedness which is embraced in a deed of trust made on said property by the Capital Club of the city of Raleigh, N. C. That all current operating expenses have been paid.

"9. That sections 6 and 7 of the charter of the Capital Club of the city of Raleigh (the old corporation), which charter was in force up until its expiration in August, 1915, are in words and figures as follows, to wit:

"'(6) The number, qualification, privileges, and method of election of members shall be fixed by the by-laws of the corporation; provided, that no person shall ever be admitted as a member of the corporation except upon the payment of twenty-five dollars ($25.00) as an entrance fee; which entrance fee may be increased or decreased as to persons admitted to membership after the date of incorporation, to such sum as the by-laws may prescribe. Any person may voluntarily cease to be a member of the corporation whenever he sees fit to withdraw therefrom; and any member may be expelled, and may forfeit his membership, under such rules and regulations as may be fixed by the by-laws.

"'(7) No member shall have the right to sell or transfer his membership or his rights or privileges as such, or to substitute another person as a member in his place; and any person ceasing to be a member, whether voluntarily or by expulsion, or by death, shall forfeit all rights and privileges of membership and all rights and claim in and to the property of the corporation, and all his interest in such property shall vest in the corporation absolutely.'

"10. That under and by virtue of the provisions of sections 6 and 7 of the charter set forth in section 12 thereof, article 4 of the Constitution in sections 1, 2 and 3 regulates the status of resident and nonresident members, said sections 1, 2 and 3 being in words and figures as follows, to wit:

" 'Section 1. Members shall be classed as resident, nonresident and honorary.

" 'Sec. 2. Resident members are such as reside or have a place of business in Raleigh Township. They are subject to dues and assessments and have a right to vote and hold office.

" 'Sec. 3. Nonresident members are such as reside out of, and have no place of business in Raleigh Township. They are not subject to assessments and are not entitled to vote or hold office.'

"11. That said sections were in force at the time of the expiration of the charter of the Capital Club of the city of Raleigh.

"Sec. 10A.—Section 2 of Article VI provides 'persons elected nonresident members shall pay annually ten dollars in advance, and shall be exempt from all other dues.

"12. That plaintiff was a resident member of the Capital Club of the city of Raleigh in good standing on 18 August, 1915, and by virtue thereof claims that he is the owner of a 1/168th undivided interest in fee in the property described in section five hereof.

"13. That plaintiff and defendant have entered into a written contract whereby plaintiff has contracted to sell and defendant has contracted to buy at the price of $250 the undivided interest of plaintiff in the lands described in said paragraph 5, provided that interest amounts to a 1/168th undivided interest in fee, as claimed by plaintiff, but defendant now refuses to comply with his contract on the grounds that plaintiff is not the owner of said interest claimed and therefore cannot comply with his contract to convey.

Plaintiff contends: That upon the expiration of the charter on 18 August, 1915, all resident members in good standing immediately became tenants in common of the club real estate and other property, and that he as such member became the owner in fee simple, subject to the then outstanding mortgage of a 1/168th undivided interest therein.

Defendant contends:

"(1) That upon the expiration of the charter of the Capital Club of the city of Raleigh upon 18 August, 1915, the entire property of said club escheated to the University of North Carolina.

"(2) That the persons who became members of the club within three years after the expiration of the charter on 18 August, 1915, have the same rights in the club property as those who were members at the time of the expiration of the charter.

"(3) That the nonresident members who were members of the club in good standing at the date of the expiration of the charter and those who became members of the club within three years after the expiration of the charter are entitled to the same rights in the club property as the resident members.

"(4) That plaintiff is not entitled to a 1/168th undivided interest in fee in said property, subject to outstanding mortgage indebtedness."

The court rendered the following judgment: "This cause coming on to be heard and being heard at Chambers, before his Honor, R. A. Nunn, judge, of the Superior Court, upon the agreed case herein and after hearing the argument of counsel for the plaintiff and defendant, and after consideration of the facts set forth in the agreed case and the exhibits attached thereto: It is ordered, adjudged and decreed:

"1. That upon the expiration of the charter of the Capital Club of the city of Raleigh on 18 August, 1915, the resident members in good standing at that time became tenants in common of the property of said corporation, subject to whatever debts it might owe at the date of the expiration of the charter.

"2. That those persons who became members of the club within three years after the expiration of the said charter have no interest as tenants in common in the property of the Capital Club of the city of Raleigh.

"3. That the nonresident members who were members of the club at the date of the expiration of the charter and those who may have joined since that time have no interest as tenants in common in the property of the Capital Club of the city of Raleigh.

"4. That the plaintiff, Ed Chambers Smith, is seized and possessed of an undivided 1/168th interest in fee in the property of the Capital Club of the city of Raleigh, and has the right to convey said interest in fee, and upon conveyance to the defendant is entitled to recover of the defendant the sum of $250 and the costs of this proceeding."

The defendant excepted and assigned error to the court below signing the judgment, and appealed to the Supreme Court.

John W. Hinsdale for plaintiff.
Paul F. Smith for defendant.

CLARKSON, J. We think there is no merit in the assignment of error to the court below signing the judgment set forth in the record. The charter of the Capital Club of the city of Raleigh, expired by limitation, on 18 August, 1915. At the time of the expiration of its charter it owned a valuable piece of real estate in the city of Raleigh at the northeast corner of Martin and Salisbury streets, upon which was situated the club building.

On 18 August, 1915, there were one hundred and sixty-eight resident members, one of whom was plaintiff, and forty nonresident members in good standing. No effort was made to liquidate and distribute the assets of the corporation within three years from the date of the expiration of its charter, the said corporation continuing to operate under the provisions of its charter, constitution and by-laws, as though its corporate existence had never ceased, until 7 April, 1922, when a new charter was procured.

The plaintiff contends that he became a tenant in common with the other resident members of the corporation in good standing on 18 August, 1915, and that he is the owner in fee simple and had the right to convey to the defendant one one-hundred sixty-eighth (1/168) undivided interest in the said property. The defendant denies the power of the plaintiff to convey the interest claimed.

The defendant contends: (1) That upon the expiration of the charter of the Capital Club of the city of Raleigh upon 18 August, 1915, the entire property of said club escheated to the University of North Carolina. We cannot so hold.

C. S., 1193, is as follows: "All corporations whose charters expire by their own limitation, or are annulled by forfeiture or otherwise, shall continue to be bodies corporate for three years after the time when they would have been so dissolved, for the purpose of prosecuting and defending actions by or against them, and of enabling them gradually to settle and close their concerns, to dispose of their property, and to divide their assets; but not for the purpose of continuing the business for which the corporation was established. In any pending action the court, in its discretion, may extend the time for winding up the affairs of such corporation."

C. S., 1194, in part, is as follows: "On the dissolution in any manner of a corporation, unless otherwise directed by an order of the court, the directors are trustees thereof, with full power to settle the affairs, collect the outstanding debts, sell and convey the property, and, after paying its debts, *divide any surplus money and other property among the stockholders,*" etc. (Italics ours.)

C. S., 1198, in part, is as follows: "Any surplus funds, after payment of the creditors and costs, expenses and allowances, shall be paid to the preferred stockholders according to their respective shares, and if there still be a surplus, *it shall be divided and paid to the general stockholders proportionately, according to their respective shares.*" (Italics ours.)

The statute permitted the corporation to continue as a corporate body for three years for the purpose of prosecuting and defending actions and to enable the corporation to gradually settle and close up its business, dispose of its property and divide its assets. The business of the corporation ceased on 18 August, 1915. The assets of the corporation had to be applied first to the payment of debts and the surplus assets to be divided among the stockholders. The fact that the charter had expired was overlooked until 1922. This case does not involve the rights of creditors, it alone concerns the rights of stockholders. It is inconceivable that a court of equity, under the facts and circumstances disclosed by the record, would confiscate the assets of the corporation and permit an escheat.

C. S., 5784, is as follows: "All real estate which has heretofore accrued to the State, or shall hereafter accrue from escheats, shall be vested in the University of North Carolina, and shall be appropriated to the use of that corporation."

In 10 R. C. L. (Escheat), part sec. 6, pp. 607-608, we find the following: "The statute laws of certain states contain provisions prohibiting a corporation from holding real property except for the purposes of its charter, or from holding beyond a prescribed limit or quantity. As a general rule it may be said that the violation of such a prohibition, where no specific penalty is imposed, does not accomplish an escheat of the property to the State. There is no question, however, but that a state may validly impose the penalty of escheat for the violation of such a statute. Where this is the case the holding of real estate by a corporation in violation of the statute, while a cause of ground of escheat, does not *ipso facto* effect an escheat; in other words, the title to the property, notwithstanding the existence of the grounds of escheat, remains in the corporation until an action for escheat is instituted; and it has been ruled that if, before this is done, the corporation bona fide sells and conveys the property to a third person, the latter is vested with an indefeasible title to the land," etc.

In *Wilson v. Leary,* 120 N. C., at p. 93, 94, in speaking of escheats, it is held: "But whatever the extent of this rule at the common law, if it was the rule at all, it was not founded upon justice and reason, nor could it be approved by experience, and has been repudiated by modern courts. The modern doctrine is, as held by us, that 'upon a dissolution the title to real property does not revert to the original grantors or their heirs, and the personal property does not revert to the original grantors or their heirs, and the personal property does not escheat to the State.'" See *Asheville Division, No. 15 v. Aston,* 92 N. C., 578.

In the *Wilson case, supra,* the case of *Fox v. Horah,* 36 N. C., 358, is overruled. See *Von Glahn v. Harris,* 73 N. C., 323; *Von Glahn v. DeRosset,* 81 N. C., 467; *Dobson v. Simonton,* 86 N. C., 492; *Smathers v.*

Bank, 135 N. C., 410; *Loudermilk v. Butler,* 182 N. C., 502; *Worthington v. Gilmers,* 190 N. C., 128.

In 14A C. J. (Corporations) part sec. 3808(c), p. 1153-1154, the following is said: "In the absence of statute the legal title to property belonging to the corporation passes by operation of law to the stockholders, who are the beneficial owners through the corporation, even where there is a statute providing that the corporation may continue to act thereafter for the purpose of closing up its business, and equity may appoint a receiver or trustee to take possession of the property to pay the debts and turn over the surplus to the stockholders as the beneficial owners of the property." The matter is thoroughly discussed in *Houston v. Utah Lake L. W. & P. Co.,* 47 A. L. R. Anno., p. 1282, At p. 1355, the doctrine that the property of a defunct corporation constitute a trust fund is set forth, known as the "trust fund doctrine": "Its nature and scope are indicated by the following statements: 'When a business corporation, instituted for the purposes of gain or private interest, is dissolved, the modern doctrine is that its property, after payment of its debts, equitably belongs to its stockholders. The dissolution of a corporation cannot deprive its creditors or stockholders of their rights in its property; and, if the common law affords them no adequate remedy, they may obtain relief in equity. Under the modern rule of equity jurisprudence, the severity of the common law in this respect is greatly mitigated, and it is held that it is the franchise, and not the property of the corporation, that is forfeited by a judgment of ouster, and that the property of the corporation is a trust fund for the payment of debts and distribution among stockholders.'" At p. 1498, North Carolina statutes and decisions on the subject are annotated.

In the case of *General Electric Co. v. West Asheville Imp. Co.,* 73 Fed. Rep., *Simonton, Circuit Judge,* at p. 388, says: "The learned counsel who represents the petitioner, in a clear and very forcible argument, contended that no application could be made to the directors for relief, because, in point of fact, there are no directors of the West Asheville Improvement Company, as the repeal of the charter extinguished the life of the corporation and of all of its agencies. But the dissolution of a corporation from any cause does not destroy its property or pay its debts. The franchise of conducting itself as a legal entity, may be, is lost. But the rights of creditors, the obligation of debtors, and the property of the shareholders, remain. And in the absence of statutory regulations, without the necessity for statutory regulations, the courts of equity take hold of and protect these interests."

In *Baldwin v. Johnson,* 95 Texas Rep. (65 S. W., 171), at p. 87-88, it is said: "No debts existed against the corporation, and the commissioners appointed under the law of Louisiana were merely for the purpose of collecting the assets and distributing them among the stockholders; but the property itself, upon the dissolution of the corporation, became the property of the stockholders, each one of whom owned an undivided interest in it in the proportion that his stock bore to the whole capital stock. *Arkansas Pass Harbor Co. v. Manning,* 2 Texas Ct. Rep., 881; 94 Texas, 558. In the case cited, *Chief Justice Gaines,* for the Court said: 'But in its last analysis, the stockholders are the beneficial owners of the assets of the corporation. This proceeding is instituted upon the theory, which we think a correct one, that the shareholders are the ultimate owners of the corporate property, and, when the corporation is dissolved and its creditors are satisfied, they hold title to the assets in proportion to their respective shares.' The proposition quoted is well sustained by authority and by sound reasoning. When the corporation existed, the title to the property was vested in it, and if a receiver or some officer had been appointed by the court to wind up the affairs of the corporation, the legal title would have rested in such officer in trust for the creditors and the stockholders. But there being no corporation, no receiver, trustee, nor creditor in existence, the trust ceased to exist and the legal and equitable title united in the stockholders, the only person who had an interest in the land. 2 Perry on Trusts, sec. 920; *How v. Waldron,* 99 Mass., 281."

In 7 R. C. L. (Corporations), part sec. 758, p. 740, it is said: "The common-law doctrine which had its origin in the fact that corporations were originally either municipal or ecclesiastical whose property must either revert or escheat is now practically obsolete in this country either by virtue of statutes or by the equitable doctrine that the assets of a dissolved corporation will be protected in equity as a trust fund for creditors and stockholders."

The defendant contends (2) that the persons who became members of the club within three years after the expiration of the charter on 18 August, 1915, have the same rights in the club property as those who were members at the time of the expiration of the charter. We cannot so hold.

7 R. C. L., sec. 754, in part: "In case of nonstock corporations, the members, while not usually denominated stockholders, are in point of principle stockholders, having an interest in the corporate property similar to that of stockholders in ordinary corporations. And the modern view that the assets of a private corporation are regarded upon its dissolution as a trust fund for the benefit of its creditors and stockholders is held applicable to such nonstock corporations. But it would seem that in the distribution of the assets of such nonstock corporations only

such persons as are deemed members of the corporation at the time of its dissolution would be held to be entitled to share therein," etc.

The defendant contends (3) that the nonresident members who were members of the club in good standing at the date of the expiration of the charter and those who became members of the club within three years after the expiration of the charter are entitled to the same rights in the club property as the resident members. We cannot so hold.

Article 4 of the constitution of the corporation, in sections 1, 2 and 3, regulates and defines the status of resident and nonresident members. These sections are as follows:

"Section 1. Members shall be classed as 'resident,' 'nonresident,' and 'honorary.'

"Sec. 2. Resident members are such as reside or have a place of business in Raleigh Township. They are subject to dues and assessments and have a right to vote and hold office.

"Sec. 3. Nonresident members are such as reside out of and have no place of business in Raleigh Township. They are not subject to assessments and are not entitled to vote or hold office."

The constitution clearly provides that the club should be owned and governed by the resident members and that the nonresident members were merely licensees. They were persons who lived outside of Raleigh Township and only had the right to enjoy the conveniences of the club when visiting. They are expressly denied the right to vote and hold office, and are relieved from the burden of assessments. A nonresident was required to pay dues of $10 per year and exempted from all other dues and assessments. The entrance fee for resident members was $25 and the annual dues were $30.

The defendant contends (4) that plaintiff is not entitled to a 1/168 undivided interest in fee in said property, subject to outstanding mortgage indebtedness. We cannot so hold.

We think from all the facts and circumstances of this particular controversy, and giving a liberal construction to the statutes heretofore quoted, and the inherent equitable power of this Court, that plaintiff is entitled to 1/168 undivided interest in fee simple in said property, and can convey a good fee-simple title to defendant, subject to the outstanding mortgage indebtedness. The judgment below is

Affirmed.

MURCHISON NATIONAL BANK v. F. K. BROADHURST, J. J. BROADHURST, W. D. AVERY, J. D. UNDERWOOD AND ED. F. WARD.

(Filed 12 June, 1929.)

1. **Abatement and Revival B a—Prior action in which full and adequate relief may be obtained will abate subsequent action.**

   It is the policy of our courts and system of pleading to avoid multiplicity of suits, and where full and adequate relief may be had in a prior action a subsequent action on the same cause of action by the same party will be abated.

2. **Same—In this case held, prior action afforded full and adequate relief, and subsequent action should have been abated.**

   Where in a creditor's bill the plaintiffs seek to set aside certain of the debtor's conveyances on the ground of fraud, and the owner of a note executed by the debtor, and secured by hypothecated bonds, joins in the creditor's bill and seeks to recover on the note and to sell the collateral, and in defense to the action on the note the debtor alleges that he was only an accommodation endorser and that usurious interest thereon was paid which he seeks to recover under the statute, and a motion is made and granted that the other makers and endorsers on the note be made parties and their respective liabilities determined: *Held*, a second action on the same note by the owner thereof, seeking the same relief, brought in a different county against all the makers and endorsers will be abated, since all the issues can be determined in the prior action and full and adequate relief granted therein.

3. **Pleadings B f—Pendency of another action may be taken by answer.**

   Where it does not appear upon the face of the complaint that another action is then pending in another county in which the same relief could be obtained, the objection may be taken by way of answer. C. S., 517.

ADAMS, J., dissents.

APPEAL by defendants, F. K. Broadhurst, and J. J. Broadhurst, from *Sinclair, J.*, at March Term, 1928, of NEW HANOVER. Reversed.

This is an action instituted by plaintiff *on 6 October, 1927,* against defendants, in the Superior Court of New Hanover County, to recover of defendants their pro rata liability on $100,000 demand note executed by defendants and J. H. B. Tomlinson and W. H. Austin, dated 30 June, 1925, with interest from 11 August, 1926. As collateral security for the payment of the note there were hypothecated 100 bonds of the par value of $1,000 each, totalling $100,000 first mortgage bonds of Smithfield Mills, Inc. It is alleged that the note is due, unpaid and demand has been made for payment.

The plaintiff prays for judgment against defendants for their pro rata liability upon said note—5/7ths of $100,000 and interest from 11 August, 1926, and decree of foreclosure of the bonds hypothecated.

The defendants, F. K. and J. J. Broadhurst, entered a special appearance and made a motion to *abate this action,* on the ground that an action by the same plaintiff and against the same defendants was instituted in the Superior Court of Johnston County *16 March, 1927,* and is now pending in said county. A certified copy of the record of said action in the Superior Court of Johnston County is appended to the motion. The action in the Superior Court of Johnston County is entitled "The Armour Fertilizer Works, a corporation, . . . Murchison National Bank, a corporation, . . . and all other creditors of F. K. Broadhurst, etc., *v.* F. K. Broadhurst, Trustee, F. K. Broadhurst, Nell Broadhurst, E. D. Broadhurst, and J. J. Broadhurst."

Section 11 of the complaint alleges: "That heretofore on 13 August, 1925, the said defendant, F. K. Broadhurst, became indebted to the plaintiff, Murchison National Bank, in the sum of $100,000, which sum is now due, with interest thereon at 6% from 15 February, 1927; the said plaintiff holds as collateral security of said debt 100 first mortgage bonds of Smithfield Cotton Mills, for the par value of $100,000, but, which, as said plaintiff is informed and believes, are really worth a much smaller sum, and this plaintiff stands ready to sell the same and apply the net proceeds on said indebtedness so as to determine the exact amount of the balance due thereon." It will be noted that the dates of the $100,000 notes and interest are different, but this is immaterial, as the debt is the same.

It further sets forth certain alleged indebtedness of F. K. Broadhurst due to defendant, E. D. Broadhurst, secured by certain deeds in trust on certain lands in Johnston County, made by F. K. Broadhurst, in which his wife, Nell Broadhurst, joins. The said deeds in trust are also signed by F. K. Broadhurst, trustee. Also certain alleged indebtedness due to defendant, J. J. Broadhurst, secured by deed in trust on certain lands in Johnston County in which his wife joins.

The complaint further alleges: "That while the said deeds in trust are, in form, deeds of trust, no third parties are named therein, and the indebtedness recited therein purports to be indebtedness of the defendant, F. K. Broadhurst, to the said E. D. Broadhurst, and J. J. Broadhurst.

That the defendants, F. K. Broadhurst and Nell Broadhurst, are husband and wife, and the defendants, E. D. Broadhurst and J. J. Broadhurst are, as plaintiffs are informed and believe, brothers of the defendant, F. K. Broadhurst; that as plaintiffs are informed and believe, at the time of the execution and registration of the aforesaid deeds of trust, there was no present valuable consideration paid by the grantees thereof for the same, and that the said F. K. Broadhurst was not indebted to either J. J. Broadhurst or E. D. Broadhurst in any substantial sum whatsoever.

"That the plaintiffs are informed and believe that the said deeds of trust were executed on the part of the grantors therein named with the intent to delay, hinder and defraud the plaintiffs, creditors of F. K. Broadhurst, as well as all other creditors, of their just and lawful actions and debts, and that the said F. K. Broadhurst well knew that he was then indebted to the plaintiffs, as well as to the United States Government for taxes, as above set forth, and to various and sundry other creditors, and while he was being pressed for the payment thereof, he executed voluntarily the aforesaid deeds of trust with the intent thus to encumber his property so as to prevent and to delay and to defraud the plaintiffs in the collection of their debts out of his property.

"These plaintiffs are informed and believe that the said deeds of trust are void in law, for that, at the time of the making thereof, the said defendant, F. K. Broadhurst, did not retain property fully sufficient and available for the satisfaction of his then creditors, but, in fact, retained no property of any substantial amount, and, although insolvent when making the said deeds of trust, the execution of the same, if allowed to stand as valid encumbrances practically withdraws from his then creditors all of the property of the said F. K. Broadhurst by said voluntary deeds of trust."

The prayer is as follows: "Wherefore, the plaintiffs pray judgment against the defendant, F. K. Broadhurst, in the amount of their respective debts above set out, and for a restraining order and injunction to prevent the transfer of the notes described in the said deeds of trust, and that the said deeds of trust be set aside and declared null and void, and for costs and for such other and further relief as to the court may seem just and proper."

In answer to paragraph 11 of the complaint, defendants say: "Paragraph 11 is untrue as stated and is denied. The facts as to the matters set out in said paragraph are: That some time prior to 13 August, 1925, the Ivanhoe Manufacturing Company executed a note to the Murchison Notional Bank in the sum of $100,000; and that on the said note F. K. Broadhurst was an accommodation endorser along with other endorsers, to wit: W. H. Austin, E. F. Ward, W. D. Avery, J. H. B. Tomlinson, J. D. Underwood and B. B. Adams. It is admitted that interest on the said $100,000 has been paid to 15 February, 1927. It is admitted that said plaintiff holds collateral security for the said $100,000 debt, 100 first mortgage bonds of Smithfield Mills, Inc., par value of $100,000. But it is untrue and is denied that said bonds are worth a much smaller sum. Defendants say that the claim of the plaintiff upon the said $100,000 note is subject to an offset on account of usurious interest executed and paid and on account of the penalty of usurious interest executed and paid on such as will more fully hereinafter appear. And further that said Murchison National Bank has filed its claim in the matter of W. H. Austin, in bankruptcy, on account of his liability upon said note."

The defendants say that it was the intention of the grantors to execute mortgage deeds and the said instruments are mortgage deeds. The defendants deny all the allegations of fraud made by plaintiffs, but say that the liens executed were in good faith and to secure bona fide indebtedness.

In regard to the indebtedness of $100,000 set out in paragraph 11 to the Murchison National Bank, defendants say that on this indebtedness usurious interest was collected as follows: "In the sum of $3,500, the total interest paid being $14,000, and the defendants ask that the said indebtedness be offset in the sum of the penalty provided by law upon payment of usurious interest, to wit, $28,000, the total interest paid being $14,000, and the said sum of $28,000 is hereby pleaded as offset to said note of $100,000."

Defendants pray: "That B. B. Adams, Wachovia Bank and Trust Company, administrator and trustee of estate of J. H. B. Tomlinson, deceased, W. D. Avery, J. D. Underwood, and E. F. Ward, be made parties defendant hereto, to the end that their respective liabilities in the premises may be determined in this action; and that summons be issued out of this court accordingly as provided by law; and . . . That any recovery herein by Murchison National Bank upon the indebtedness described in paragraph 11 of the complaint, be credited with $28,000 penalty of usury hereinbefore pleaded, and further credited by such dividends as it may receive in the matter of W. H. Austin, in bankruptcy, on account of his obligation as principal or endorser of said note."

The above are the material facts. The court below rendered the following judgment: "This cause coming on to be heard at this term of the court, before his Honor, N. A. Sinclair, judge presiding, upon the motion filed herein by the defendants, F. K. Broadhurst and J. J. Broadhurst, to abate this action, all of said parties being before the court and represented by counsel, and all parties having waived a hearing upon said motion before the clerk, and having agreed to hear same as though upon appeal from the clerk: Upon consideration of which motion it is considered and adjudged that the motion to abate be and the same is hereby denied." The defendants duly excepted, assigned error and appealed to the Supreme Court.

Varser, Lawrence, Proctor & McIntyre for plaintiff.
R. G. Grady, Bailey & Weatherspoon for defendants.

CLARKSON, J. The question involved: Where plaintiff in a creditor's bill, in an action instituted in Johnston County, demanded judgment upon a $100,000 note and subsequently instituted an action in New Hanover County on the same note, should the second action be abated as to those who are defendants in both actions? We think so.

Plaintiff, a creditor, joined in a creditor's bill to set aside certain conveyances made by F. K. Broadhurst, by way of mortgage on lands in Johnston County on the ground that they were fraudulent and void as to creditors. The action must be tried in that county, subject to the power of the court to change the place of trial in certain cases. C. S., 463(1); *Wofford v. Hampton,* 173 N. C., 686; *Lumber Co. v. Lumber Co.,* 180 N. C., 12; and if brought in New Hanover County, it would have been subject to change of venue. C. S., 470; *Causey v. Morris,* 195 N. C., 532.

In the first action in Johnston County it will be noted that the Murchison National Bank, in the creditor's bill, sets forth the note of $100,000, and the hypothecated bonds of the Smithfield Mills, Inc., which it says it stands ready to sell and apply the net proceeds on the indebtedness. The prayer for judgment in that action is for the debt. The answer sets up certain defenses: (1) F. K. Broadhurst was an accommodation endorser along with other endorsers; (2) pleads an offset of $28,000 usurious interest and penalty, and prays that the other endorsers be made parties, and the indebtedness be credited with $28,000, and also credited with any amount received from the bankruptcy estate of W. H. Austin, the Murchison National Bank having filed this claim against the bankruptcy estate. All these matters, so far as the appealing defendants are concerned, can be tried out in the Johnston County action, under our liberal practice, as well as setting aside the conveyances for fraud. *Chemical Co. v. Floyd,* 158 N. C., 455; *Robinson v. Williams,* 189 N. C., 256; *Carswell v. Talley,* 192 N. C., 37.

This action in Johnston County was pending when the action in New Hanover County was instituted. Full and adequate relief against the appealing defendants is obtainable in the Johnston County action.

"*Tests of Identity in General.* Four leading tests have judicial sanction in determining whether or not the causes of action are the same for the purpose of abatement by reason of the pendency of a prior action: (1) 'Clearly, in order to hold the subsequent suit to be necessary, it is an essential prerequisite that the judgment in the former or prior action should be conclusive between the parties and operate as a bar to the second.' (*Williams v. Gaston,* 148 Ala., 214, 216, 42 S., 552.) In other words, if a final judgment in the former suit would support a plea of *res adjudicata* in the subsequent suit, the suits are identical for this purpose; otherwise they are not. (2) Many cases apply the following test: Was full and adequate relief obtainable in the prior action? If so, the second action was improperly brought and is abatable; if not, the objection will be overruled. This, as we shall see, is a generally recognized rule. (3) A test having the support of some of the cases is this: Will the same evidence support both actions? (4) A fourth test supported by English and Canadian authorities is: Could the bill in the second suit have been procured by a fair amendment of the first?" 1 C. J., p. 66, par. 83.

Under the pleadings in the Johnston County action, by the submission of the issues arising on the pleadings, plaintiff could obtain full and adequate relief against the appealing defendants. The prayer in both actions, in the Superior Court of New Hanover County and Johnston County, is for judgment on the $100,000 note and interest, and in both pleadings the hypothecated collateral is set forth. In either case this collateral could be sold and applied on any judgment obtained. Plaintiff elected with others to file a creditors' bill in Johnston County Superior Court to set aside certain conveyances, alleged to have been made in fraud of creditors, and prays for judgment on its debt. Plaintiff did this voluntarily—it chose the forum, the jurisdiction. To be sure, such an action must be tried in the county where the land was situate, but it had the election to go in or not go in the particular action. It chose to go in Johnston County Superior Court. Multiplicity of actions against the same parties are not encouraged. *Emry v. Chappell,* 148 N. C., 327; *Construction Co. v. Ice Co.,* 190 N. C., 580; *Chappell v. National Hardwood Co.,* 234 Mich., 296, 44 A. L. R., 804; *Van Vleck v. Anderson,* 136 Iowa, 366; *Haas v. Righeimer,* 220 Ill., 193.

"In *Alexander v. Norwood,* 118 N. C., 382, the court said: 'The purpose of the Code system is to avoid a multiplicity of actions by requiring litigating parties to try and dispose of all questions between them on the same subject-matter in one action. Where an action is instituted and it appears to the court by *plea,* answer, or demurrer that there is another action pending between the same parties, and substantially on the same subject-matter, and that all the material questions and rights can be determined therein, such action will be dismissed.' In that case the Court said that 'the plaintiff (in the second action) has no election to litigate in the one or bring another action, but must set up his defense in the first action, *Rogers v. Holt,* 62 N. C., 108, and the Court will *ex mero motu* dismiss the second action as the parties, even by consent, cannot give the court jurisdiction.' *Long v. Jarratt,* 94 N. C., 443." *Allen v. Salley,* 179 N. C., at pp. 150-1; *Distributing Co. v. Carraway,* 196 N. C., 58. "A demurrer would lie if the pendency of the former action appeared on the face of the complaint." *Allen v. Salley, supra,* at p. 148; *Lineberger v. Gastonia,* 196 N. C., at p. 449. Grounds not appearing on the face of complaint, the objection may be taken by answer. C. S., 517. For the reasons given, the judgment below is

Reversed.

ADAMS, J., dissents.

TWIN CITY MOTOR COMPANY v. ROUZER MOTOR COMPANY AND COMMERCIAL FINANCE CORPORATION.

(Filed 12 June, 1929.)

1. **Chattel Mortgages A b—In this case held, description of chattel in chattel mortgage sufficient for identification.**

The description in a chattel mortgage for the purchase price of an automobile "one S. H. Coupe No......... Model T" is sufficient to admit evidence *aliunde* for the purpose of identification when the purchaser owned only one automobile, the abbreviation "S. H." meaning "second-hand," and "Model T," a certain type of Ford; and when registered and identified is superior to a later registered mortgage given by the purchaser to others.

2. **Chattel Mortgages B c—Registered chattel mortgage is superior to later mortgage for repairs where mechanic surrenders possession.**

Where a chattel mortgage for the purchase price of an automobile expressly retains title to the automobile and all improvements made thereon, and stipulates that the giving of possession thereof to the purchaser was not to pass title to him, and the instrument is duly registered, the purchaser during the continuance of the contract may have repairs made that are necessary for its operation, and the seller's mortgage is superior to a mortgage for repairs given to a mechanic in lieu of his mechanic's lien which he had lost by surrender of possession of the car.

APPEAL by plaintiff from *Oglesby, J.,* at October Term, 1928, of ROWAN. Affirmed.

The material facts agreed to by the parties necessary for the decision of the action:

On 3 May, 1926, one Wm. Simpson purchased from the defendant, Rouzer Motor Company, a second-hand Ford coupe automobile and executed a conditional sale agreement to secure the balance of the purchase price, $325, to be paid in certain installments, which was duly recorded in the office of the register of deeds for Rowan County, N. C.

The material language of the conditional sale agreement, for the consideration of this case: "That seller . . . has this day sold and delivered, but upon the conditions hereinafter recited, to the purchaser

(Wm. Simpson) one S. H. Coupe, No. ......, Model T. (hereinafter called the 'car') for three hundred seventy-five and no/100 dollars ($375.00), paid or to be paid by the purchaser to the seller. . . . . The conditions of this agreement are, that delivery of the car by seller to purchaser does not pass title thereto, *but both the car and all additions and improvements thereto* and the title thereto shall not pass by such delivery, but are and shall remain vested in and be the property of the seller and assigns (and any extension or assignment of said notes shall not waive this or any other condition herein contained) until said notes, or any renewals thereof, evidencing said installments of purchase price, and all interest thereon, are paid in full. . . . Purchaser shall keep the car free from all liens, taxes, charges, and shall at his expense and in his name cause the car to be registered and licensed in compliance with law." The abbreviations "S. H." appearing in the conditional sale agreement from William Simpson to Rouzer Motor Company stands for the words "second-hand," and the words "Model T" in said agreement refer to a particular type of Ford automobile.

The said Rouzer Motor Company duly transferred and endorsed said note and conditional sale agreement to the Commercial Finance Corporation, the defendant, of Salisbury, which now holds the same. That the said automobile described in said conditional sale agreement is the only automobile owned by the said William Simpson on 3 May, 1926, and until the bringing of this action. That William Simpson moved from Salisbury to Winston-Salem during the month of March, 1927, leaving a balance of $210 due on said note and conditional sale agreement. That William Simpson, then living in and a resident of Winston-Salem, on 8 July, 1927, employed the Twin City Motor Company, the plaintiff, at Winston-Salem, to place and did place a new engine or motor in the automobile described in the said conditional sale agreement to Rouzer Motor Company, and on the same day the said William Simpson executed to said Twin City Motor Company a note for $108, with interest from 8 July, 1927, (the balance due is $89.15) to cover the price of said new motor or engine and the cost of the labor in installing the same in said chassis, and to secure said note the said William Simpson executed to said Twin City Motor Company a conditional sales note and chattel mortgage. Said conditional sale note and chattel mortgage were duly recorded in the office of the register of deeds of Forsyth County, N. C., both describing same—the chattel mortgage—"One Ford coupe automobile, motor No. 14860614." In the conditional sale note the only change is "engine" instead of "motor."

On 17 November, 1927, defendants sold the coupe to one Homer Hall for $130, and took a chattel mortgage to secure said debt, which was duly recorded. That at the time of said sale $130 was the fair and reasonable market value of said automobile, and $95 the fair and reasonable market value of said new engine or motor alone. That when plaintiff removed the old engine from said chassis said old engine was worn out and worthless. That said new engine or motor is separable from said chassis or body of said automobile and may be removed from said chassis or body without injury to same, which removal could be affected by unfastening certain bolts, nuts, and screws and lifting said engine out.

The court below rendered the following judgment: "This cause coming on to be heard at October Term, 1928, of Rowan Superior Court, before his Honor, John M. Oglesby, judge of the Superior Court, and being heard upon an agreed statement of facts signed by the parties, and the court being of the opinion that the plaintiff is not entitled to recover on the facts as set forth in the 'agreed statement of facts.' It is now, on motion of P. D. Carlton, counsel for defendants, ordered and adjudged:

1. That plaintiff take nothing by its action from the defendants, and that the defendants go hence without day.
2. That the costs of this action, including the costs incurred by the defendants, be taxed against the plaintiff.
3. That this action be, and the same is hereby dismissed."

The plaintiff excepted and assigned error to the court below signing the judgment, and appealed to the Supreme Court.

Lee Overman Gregory and F. L. Webster for plaintiff.
John Kesler and P. S. Carlton for defendants.

CLARKSON, J. (1) Is the description in the conditional sales agreement sufficient for the purpose of identifying the property in question? We think so. The facts agreed to in regard to the description is as follows: One S. H. coupe No. ...., Model T. (hereafter called the "car"). The abbreviation of the words "second-hand" is S. H., and the words "Model T" in said agreement refer to a particular type of Ford automobile. The same was purchased from Rouzer Motor Company on 3 May, 1926, by William Simpson, being one S. H. coupe No. ...., Model T, and the only automobile owned by William Simpson.

Both plaintiff and defendants cite *Stephenson v. R. R.*, 86 N. C., 455, and we will do the same. The general principle is laid down by *Ruffin, J.*, at pp. 456-7, as follows: "We concur in the view taken by his Honor. While it cannot be expected that a mortgage should set forth a description of the property conveyed with such certainty that it may be identified by the terms of the instrument alone, and without the aid of evidence *aliunde* to fit the description to the thing, still it is necessary that it should furnish some description of the property accompanied with such certainty as will enable third parties, aided by inquiries which the deed itself suggests, to identify it. This latter has been held sufficient, under the maxim *id certum est quod certum reddi potest,* and from necessity—it being many times impossible to set out such a description of the thing conveyed, as would in itself be absolutely certain and complete. But a less degree of certainty will not suffice, and especially under our registry laws, the fundamental policy of which is to give such notice to third parties as will enable them to deal securely with reference to the property conveyed in mortgage."

In *Spivey v. Grant,* 96 N. C., at p. 223-4, it is said: "The possession of a single horse, and none others by the vendor in a conveyance of a horse, without more specific description, sufficiently points out and designates the animal to transfer property to the vendee. In *Sharp v. Pearce,* 74 N. C., 600, the conveyance was of 'one horse,' and this was recognized as a sufficient identification." *Alston v. Savage,* 173 N. C., 213; see *Atkinson v. Graves,* 91 N. C., 99.

11 C. J. (Chattel Mortgages), sec. 81, p. 461, makes the following observations: "The scarcity or plentitude of chattels similar to those mortgaged is an element to be considered in determining the sufficiency of the description of the chattels covered by the mortgage, and the nonexistence of other property to which the terms of the mortgage could apply frequently renders valid a description in a mortgage which otherwise would be too indefinite."

(2) Do the improvements or repairs placed on said car become the property of the defendants under the terms of their duly registered agreement, and also by the doctrine of accession? We think so.

It is a general rule of law that if the materials of one person are united to the materials of another by labor, forming a joint product, the owner of the principal materials will acquire the right of property in the whole by right of accession. *Pulcifer v. Page,* 32 Me., 404, 405, 54 Am. Dec., 582." 1 Words and Phrases Judicially Defined, p. 59.

In *Gregory v. Stryker,* 2 Denio (N. Y.), at p. 630, speaking to the subject, it is said: "But it is equally clear, as a general proposition, that where the owner of a damaged or worn out article delivers it to another person to be repaired and renovated by the labor and materials of the latter, the property in the article, as thus repaired and improved, is all along in the original owner, for whom the repairs were made, and not in the person making them." *Comins v. Newton,* 10 Allen (Mass.), 518; *Southworth v. Isham,* 5 N. Y. Sup., 448.

C. S., 2435, in part, is as follows: "Any mechanic or artisan who makes, alters or repairs any article of personal property at the request of the owner or legal possessor of such property has a lien on such property so made, altered or repaired for his just and reasonable charge for his work done and material furnished, and may hold and retain possession of same until such just and reasonable charges are paid," etc. Where the vendor of an automobile takes a purchase-money mortgage and transfers the possession to the vendee, it is with the implied authority in the vendee that he may use the machine and keep it in such reasonable and just repair as the use will require; and where, at his instance, a mechanic has repaired the same, his reasonable charge for such repairs creates a lien on the automobile, retained in his possession, superior to that of the vendor's mortgage. *Johnson v. Yates,* 183 N. C., 24, 11 S. E., 630; *Sales Co. v. White,* 183 N. C., 671.

Under this section: The lien on personal property given by this section applies when possession is retained by the mechanic. *Glazener v. Gloucester Lumber Co.,* 167 N. C., 676, 83 S. E., 696. If the mechanic or artisan surrenders possession of the property, he loses his lien. *Tedder v. R. R.,* 124 N. C., 342, 32 S. E., 714.

The conditional sales agreement made by William Simpson distinctly says, "The conditions of this agreement are, that delivery of the car by seller to purchaser does not pass title thereto, *but both the car and all additions and improvements thereto,* and the title thereto shall not pass by such delivery, but are and shall remain vested in and be the property of the seller and assigns (any extension or assignment of said notes shall not waive this or any other condition herein contained) until said notes, or any renewals thereof, evidencing said installments or purchase price, and all interest thereon, are paid in full."

In *Bank v. Pearson,* 186 N. C., at p. 613, the following principle is laid down: "On the third objection it is the approved principle in this jurisdiction that a mortgage will be held to extend to and include after-acquired property 'when it so states in express terms, or it clearly appears from the language used that such was its manifest intention.' *Lumber Co. v. Lumber Co.,* 150 N. C., 282; *Dry Kiln Co. v. Ellington,* 172 N. C., 481-484." *Hamlin v. Jerrard,* 72 Me., 62.

Plaintiff had the possession of the car upon which defendants had a lien properly registered when it installed in the car a new engine or motor to replace the old one. It relinquished possession and thereby relinquished its lien for the repairs. It then took a conditional sale note purporting to be for the purchase price, of "one Ford coupe automobile, engine No. 14860614." At the same time the plaintiff had the said William Simpson to execute a chattel mortgage on "one Ford coupe automobile, motor No. 14860614," both of which instruments were duly recorded in Forsyth County.

The authorities are conflicting in other jurisdictions. The lien of defendants is superior to that of plaintiff. The judgment below is

Affirmed.

STATE v. JOHN FREEMAN AND DOCK CAUDILL.

(Filed 12 June, 1929.)

1. **Criminal Law L g—Upon appeal from conviction in a criminal case the Supreme Court is confined to matters of law or legal inference.**

   The Supreme Court is ordinarily confined to matters of law or legal inference on appeal from a judgment upon a verdict of guilty in a criminal action where the evidence is conflicting upon the question of the defendant's guilt or innocence. Const., Art. IV, sec. 8.

2. **Criminal Law G j—Testimony of accomplice should be scrutinized, but is competent evidence.**

   Upon the trial for arson under the provisions of C. S., 4238, testimony of an accomplice that the two defendants set fire to a dwelling at night in which the prosecuting witness was sleeping is competent, but should be scrutinized by the jury and not accepted as evidence unless they find beyond a reasonable doubt that it is true, and under correct instructions, it is within the province of the jury to accept it in part and reject it in part, and to convict one of the defendants and acquit the other upon conflicting evidence.

3. **Criminal Law G q—Testimony of witness as to communication between husband and wife made in his presence is competent.**

   Testimony of a witness that at the time of the arrest of the defendant, by the officers of the law, his wife was present and said to him: "I told you that you would get into it if you did not stay with me like I wanted you to," to which he replied: "hush," is not a confidential communication between husband and wife within the contemplation of C. S., 1802, and may be testified to by the witness who was present and heard it, and is some evidence of guilt in connection with the other evidence in the case.

STACY, C. J., dissenting; BROGDEN, J., dissenting opinion.

APPEAL by defendant, John Freeman, from *Harwood, Special Judge,* at February Term, 1929, of YADKIN. No error.

Criminal action in which the above-named defendants were tried upon their plea of not guilty to an indictment charging them with arson.

There was a verdict that defendant, John Freeman, is guilty, and that defendant, Dock Caudill, is not guilty, of the felony and arson charged in the indictment.

From judgment that he suffer death, as prescribed by statute (C. S., 4238) the defendant, John Freeman, appealed to the Supreme Court.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

S. E. Edwards, W. Reade Johnson and John C. Wallace for defendant.

CONNOR, J. During the night of 23 July, 1928, the dwelling-house and barn of C. F. Sofley, in Yadkin County, North Carolina, were destroyed by fire; at the same time the garage, located on his premises, near the dwelling-house and barn, was damaged by fire. Weeds growing near the garage were burned; the weather-boarding and roof of the garage were scorched, but the building was not destroyed.

There was evidence on behalf of the State tending to show that the fires which destroyed the dwelling-house and barn, and damaged the garage, were separate and distinct, and that each of said fires was of incendiary origin. The fires were first discovered by C. F. Sofley between 11 and 12 o'clock at night. He and his family had gone to bed at about 9 o'clock and were asleep when they were awakened by the fire which destroyed their home. The barn and garage were then on fire and burning.

There was evidence tending to show that gasoline had been used to start each of the fires. Witnesses for the State testified that they saw three men walking on the highway a short distance from Sofley's home on the night of the fire, about 30 minutes before the fires were discovered. These men pulled their caps down over their eyes and turned their heads as the witnesses, riding in an automobile, passed them. Neither of witnesses recognized the men, or was able to identify them or either of them. One of the witnesses was of the opinion that all three were white men.

Tracks near the barn and the garage were discovered the morning after the fire. Some of these tracks led away from the premises in the general direction of the home of Jack Hunt, which is at a distance of about a mile from the home of C. F. Sofley. A short time before the fire Jack Hunt had been arrested on a warrant, procured upon information furnished by C. F. Sofley, charging him with the unlawful sale of intoxicating liquor. Shoes were found at his home which fitted some of the tracks which were discovered on the premises of C. F. Sofley. Jack Hunt was arrested and at a previous term of the court had entered a plea of guilty to house-burning. He had been sentenced to serve a term of ten years in the State's prison upon this plea, and is now serving this sentence.

Upon the trial of the defendants in this action the State relied upon the testimony of Jack Hunt as evidence to sustain its contention that defendant, John Freeman, set fire to the dwelling-house; that defendant, Dock Caudill, set fire to the barn, and that the witness, Jack Hunt, set fire to the garage, and that they had set fire to the buildings pursuant to a conspiracy entered into by and between them to burn said buildings because C. F. Sofley had caused the arrest of Jack Hunt for selling liquor. The testimony of Jack Hunt, if believed, was amply sufficient as evidence to sustain the contentions of the State that both the defendants are guilty as charged in the indictment.

There was evidence of facts and circumstances which tended to support the testimony of Jack Hunt. Each of the defendants offered evidence in contradiction of the testimony of Jack Hunt. The evidence for each of the defendants tended to sustain his contention that he had not entered into a conspiracy with Jack Hunt to burn the buildings of C. F. Sofley, as testified by him, and that he was elsewhere when the buildings were burned.

All the evidence was submitted to the jury under instructions which are free from error. The court instructed the jury that they should consider the fact as testified by him that Jack Hunt was an accomplice of the defendants in the commission of the crime for which they were on trial, and that for this reason they should scrutinize his testimony with great care and not accept such testimony as evidence unless they found beyond a reasonable doubt that it was true. The instruction in this regard was in full compliance with the principles stated in *S. v. Ashburn,* 187 N. C., 717, 122 S. E., 833. It was within the province of the jury to accept the testimony of Jack Hunt, in part, and to reject it, in part, and thus to convict the defendant, John Freeman, and to acquit the defendant, Dock Caudill. In the absence of error in the decisions of the trial court upon matters of law or legal inference, this Court is ordinarily without jurisdiction to grant a new trial to the defendant, John Freeman, upon his appeal from the judgment which is supported by the verdict. Constitution of N. C., Art., IV, sec. 8. The jury believed the evidence offered by the defendant, Dock Caudill, tending to establish his defense based upon an alibi, and rejected the evidence offered by the defendant, John Freeman, to establish a similar defense. This was within their province, and the judgment and verdict cannot be set aside and a new trial granted by this Court, in the exercise of its appellate jurisdiction, for the reason that we find no error in the record.

The defendant, John Freeman was at his home when he was arrested on a warrant charging him with arson. His wife was present at the time of the arrest, and in the presence of the officers said to him, "I told you, John, that you would get into it if you did not stay with me like I wanted you to do." He replied to her, "Hush."

Defendant's exception to the refusal of the court to sustain his objection to this evidence cannot be sustained. The objection was properly overruled upon the authority of *S. v. Randall,* 170 N. C., 757, 87 S. E., 227. In the opinion in that case it is said that conversations between husband and wife are not privileged as confidential, so as to prevent a third person who overheard them, from relating them to the jury. The statute in this State (C. S., 1802), which provides that no husband or wife shall be compellable to disclose a confidential communication made by one to the other during their marriage, and that neither shall be competent or compellable to give evidence against the other in a criminal action, has no application, for the reason that the conversation between defendant and his wife was not a confidential communication, and for the further reason that the wife did not undertake to give evidence against her husband as in *S. v. Aswell,* 193 N. C., 399, 137 S. E., 174, nor was she under cross-examination as a witness for her husband as in *S. v. Adams,* 193 N. C., 581, 137 S. E., 657. Defendant's reply to the remark of his wife to him, made in the presence of the officers, was competent as evidence against him. The remark of his wife, taken together with his reply to her, was properly admitted as evidence. *S. v. McKinney,* 175 N. C., 784, 95 S. E., 162.

The evidence upon the trial of this case was amply sufficient to sustain the conviction of both defendants and of the witness, Jack Hunt, for arson. Jack Hunt upon an indictment for arson tendered a plea of guilty of house-burning, which was accepted by the State. He is now serving a term in the State's prison. Defendant, Dock Caudill, was acquitted by the jury, and he has been discharged. Defendant, John Freeman, was convicted, and the judgment that he suffer death, from which he appealed, must be affirmed, for we find no error of law in his trial.

No error.

STACY, C. J., dissenting.

BROGDEN, J., dissenting opinion.

BROGDEN, J., dissenting: I concede that this case is written in accordance with the precedents, but I do not concur in the reasoning of the precedents. C. S., 1802 provides in substance that the wife is not competent "to give evidence" against her husband. It is asserted, however, in the decisions that if the wife makes a declaration in the presence of her husband and a third party, she cannot go upon the witness stand and repeat her declaration because this would be giving evidence, but the third party can repeat to the jury her identical words and this is not giving evidence by her, although the evidence so admitted and used to convict is the exact language used by the wife. The evidence then is not the language repeated by the wife, but the repetition of it by some one who did not use it at all. Furthermore, the wife cannot "give evidence," that is, her declaration under oath in the presence of the jury—a third party—but if she make a declaration in the presence of her husband and a third party and not under oath, the same is competent if repeated by the third party in court. In other words, her sworn declaration in court is not evidence, but her unsworn declaration out of court is evidence. It is suggested that if the declaration is made in the presence of a third party it is not a confidential communication because, presumably the parties knew of the presence of another person. However, it has been held that if a man and his wife were talking together, thinking that they were communicating in secret, and an eavesdropper, listening at the key-hole, should overhear the conversation, it would thereupon cease to be a confidential communication. *S. v. Wallace,* 162 N. C., 622; *S. v. Randall,* 170 N. C., 757. Hence the confidential character of the communication does not depend upon the known presence of a hearer.

The reason given for admitting the declarations or hysterical outbursts of the wife in the presence of an officer arresting her husband, is that his silence or rebuke is a confession of guilt of the identical crime charged in the warrant in the possession of the officers, even though the wife may not know the nature of the crime for which the husband is arrested. The logical suggestion is that the husband, under such circumstances, "ought to talk back to his wife" and enter into a debate with her upon the question of his innocence. Of course, in some instances this might be a highly dangerous undertaking for a husband, but if he fails to debate the question, her hysterical outburst will be used to convict him. In this situation the unfortunate husband may well exclaim, "Which way I fly is hell."

The present case illustrates the unreason of the rule. Jack Hunt, who admitted that he set fire to one of the buildings, and who was serving a term in the penitentiary therefor, was used as a witness against the defendant, Freeman, and one Caudill. Hunt testified that he entered into a conspiracy with the other two men to burn the dwelling and outbuildings of the prosecuting witness and that Freeman and Caudill participated in the burning thereof. The jury, however, did not believe Hunt because Caudill was acquitted. The evidence against Caudill was identically the same as that against the defendant, Freeman, with the sole exception of the declaration of Freeman's wife. The sheriff testified that when he went to Freeman's house to arrest him his wife began to cry and "take on," and thereupon made the declaration set out in the opinion. It would therefore seem to be clear that the defendant, Freeman, is now on death row under sentence of death and facing execution solely because of the hysterical outburst of his wife.

In my judgment this evidence was incompetent for two reasons:

First. The wife did not accuse the husband of burning a house. Indeed it does not appear that the warrant was read in her presence or that she even knew the nature of the crime laid against her husband.

Under the strain of nervous shock she merely exclaimed: "I told you, John, that you would get into it," etc. Get into what? It is assumed that she meant that she knew of the conspiracy to commit arson and was accusing her husband of guilt of committing the specific crime charged in the warrant, of which ostensibly she knew nothing. In my opinion the exclamation of the wife did not amount to an accusation, and had no probative value as evidence, although it was doubtless used with overwhelming effect before the jury.

I am authorized to say that this is the ground upon which STACY, C. J., also dissents.

Second. I do not think the evidence is competent because it permits the wife to do indirectly what she cannot do directly for that her sworn declaration is a nullity, but her unsworn declaration, repeated by another, is competent evidence, which, in this case, apparently sends her husband to the electric chair.

STATE OF NORTH CAROLINA, EX. REL. DENNIS G. BRUMMITT, ATTORNEY-GENERAL OF THE STATE OF NORTH CAROLINA, v. THE SNOW HILL RAILWAY COMPANY.

(Filed 12 June, 1929.)

1. **Corporations K a—State alone may sue for forfeiture of charter of railroad company for violation of C. S., 3456.**

   The State alone, acting through the Attorney-General, may institute a proceeding against a railroad company to forfeit its charter under the provisions of C. S., 3456, for failure to begin construction of the railroad and complete the same within the two separate periods therein prescribed.

2. **Corporations K b—Charter of railroad company may be forfeited for failure to comply with either of time limits under C. S., 3456.**

   Construing C. S., 3456, as to the forfeiture of the charter of a railroad company when construction of the proposed road is not commenced within three years or completed and put into operation within ten years after its charter has been granted, to make the two provisions consistent it is held that they are not alternative, and upon the failure of a railroad to comply with either one of the provisions the suit of the Attorney-General will be maintained in the absence of acts or conduct upon the part of the sovereign that amount to a waiver of the default.

3. **Same—In this case held, the State waived its right to forfeit the charter of the railroad company for noncompliance with C. S., 3456.**

   Where a railroad company has not commenced the construction of its road within three years after its charter has been granted as required by statute, C. S., 3456, and thereafter by statute the Legislature declares that certain bonds may be issued by a township to aid in the construction of the railroad shall be valid, and the county has acted in recognition of the existence of the corporation: *Held*, the State by its acquiescence in the delay and by its recognizing the railroad company as an existing corporation has waived its right to insist on a forfeiture.

CIVIL ACTION, before *Grady, J.*, at June Term, 1928, of GREENE.

On 13 February, 1920, the Snow Hill Railway Company duly filed articles of incorporation in the office of the Secretary of State. A board of six directors, with authority to manage the corporation until their successors were elected and qualified, was named in the certificate of incorporation.

The object of the incorporation, as set forth, was for the construction and operation of a railroad from the town of Snow Hill to connect with the East Carolina Railroad at the town of Hookerton, N. C., or the town of Maury, N. C., the length of the road to be about six miles.

The construction of said road was not begun until about 1 January, 1928. Prior thereto the said Snow Hill Railway Company had made a contract with Nello Teer, a competent and reputable contractor, to construct said railroad. Teer began work about 1 January, 1928, and had practically completed the grading thereof and had spent for such purpose the sum of $39,215.89. Thereupon on 12 March, 1928, the Attorney-General of the State brought this action to forfeit the charter of said railway company.

The railway company filed an answer admitting that it did not begin the construction of the road within a period of three years from filing the certificate of incorporation and that it did not within said period expend upon construction ten per cent of the amount of its capital. It alleged, however, that the delay was due to inability to finance the project, but that on 1 January, 1928, it had in good faith made a contract with Teer to construct said road, and that, relying upon said contract, Teer had in good faith expended a large sum of money before this suit was brought.

The trial judge entered a judgment declaring the charter forfeited and based his ruling upon the admission that the railway company had not begun construction within three years after its charter had been filed in the office of Secretary of State and had not within said period expended upon construction ten per cent of the amount of its capital stock.

From judgment rendered, the defendant appealed.

L. V. Morrill and Cowper, Whitaker & Allen for plaintiff.

J. Paul Frizzelle, Fuller, Reade & Fuller and John Hill Paylor for defendant.

BROGDEN, J. The sole question presented for determination is the meaning of C. S., 3456, and whether it applies to this case. The statute is worded as follows: *"Forfeiture for failure to begin or complete railroad.*—If any railroad corporation shall not within three years after its articles of association are filed and recorded in the office of the Secretary of State, or the passage of its charter, begin the construction of its road and expend thereon ten per cent of the amount of its capital, or shall not finish the road and put it in operation in ten years from the time of filing its articles of association or passage of its charter as aforesaid, its corporate existence and powers shall cease."

The sovereign alone, acting through the Attorney-General, can institute a proceeding to forfeit a charter for the cause set forth in the complaint. *Attorney-General v. R. R.,* 28 N. C., 456; *Asheville Division v. Aston,* 92 N. C., 579; *R. R. v. Lumber Co.,* 114 N. C., 690, 19 S. E., 646; *R. R. v. Olive,* 142 N. C., 257, 55 S. E., 263.

The statute, when an action is brought by the Attorney-General, in the name of the State inflicts the penalty of corporate death upon railroad companies for failure to begin construction within three years or to complete the road and put it in operation within ten years. The statute as written is worded in the alternative because the word "or" connects the three-year penalty and the ten-year penalty. However, if the alternate construction is adopted, it is obvious that if "corporate existence and powers shall cease" for failure to begin in three years that the ten-year clause is useless and contradictory. Upon the other hand, if "corporate existence and powers shall cease" only upon failure to finish the road and put it in operation within ten years, it is equally obvious that the three-year clause is useless and contradictory.

Manifestly, the statute intended to require railroads to begin construction work within three years and to complete the road and put it in operation within ten years, thus fixing a maximum time for beginning the work and a maximum time for the completion thereof, and pronouncing the sentence of corporate death upon failure to comply with either requirement.

But, can the State insist upon forfeiture in this case? "The government creating the corporation can alone institute such a proceeding, since it may waive a broken condition of a compact made with it as well as an individual." *Asheville Division v. Aston,* 92 N. C., 579.

Moreover, the acquiescence of the sovereign "is evidence that all things have been rightfully performed." *Attorney-General v. R. R.,* 28 N. C., 456. See, also, *R. R. v. Lumber Co.,* 114 N. C., 690; *In re F. W. Myers Co.,* 123 Fed., 952.

The acquiescence of the sovereign in the default of defendant was explicitly declared by the legislative enactment of chapter 89, Public-

Local Laws, Extra Session, 1924, ratified 21 August, 1924. Prior thereto, to wit, on 4 February, 1924, the defendant, Snow Hill Railway Company, submitted to the board of county commissioners of Greene County an offer in writing to complete said railroad within eight months from the time the work started, provided the same was started on or before 1 April, 1924, and to accept in full payment for said work the $100,000 of bonds voted by Snow Hill Township. The county commissioners accepted the offer by formal resolution in regular meeting assembled on 4 February, 1924. Chapter 89, referred to above, in section six thereof, declares: "And said bonds and contracts concerning same and the said improvement shall be valid notwithstanding any change in officers after the date," etc. In section seven of said act it is declared: "The said bonds may be executed and deposited in a bank of their selection, said bonds to be held in escrow by such bank and delivered to Snow Hill Railway Company on completion of said improvement by said company," etc.

Therefore, it clearly appears that the Snow Hill Railway Company was recognized as an existing corporation, in rightful exercise of its corporate functions, even though more than three years had elapsed since the filing of its charter and even though no construction had been done and no money expended thereon. Moreover, the act authorized the delivery of the bonds to the defendant "on completion of said improvement by said company." The time of completion, fixed by C. S., 3456, is ten years from the filing of the charter. Thus, the conclusion is inevitable that the State waived the default occasioned by failure to begin work within three years and expressly recognized the right of the defendant to proceed to completion, which of course must be accomplished "in ten years from the time of filing its articles of association."

The principle of law applicable was stated by *Ruffin, C. J.*, in *Attorney-General v. R. R., Co.*, 28 N. C., 456, to be that if the sovereign undertakes "to deal with the corporation as lawfully and rightfully existing, notwithstanding such known default; such conduct must be taken, as in other cases of breaches of conditions, to be intended as a declaration, that the forfeiture is not insisted on, and, therefore, as a waiver of the previous default."

Our conclusion is that the Attorney-General has no power to invoke a forfeiture of the charter of the defendant for failure to begin work within three years.

Reversed.

RALPH UREY v. SOUTHERN FIRE INSURANCE COMPANY.

(Filed 12 June, 1929.)

1. **Insurance H a—Five days notice necessary for cancellation of policy by insurer.**

The provisions in the standard fire insurance policy requiring the insurer to give the insured five days previous written notice before it cancels the policy is for the protection of the insured and must be complied with by the insurer before it can make a valid cancellation.

2. **Insurance H b—Defense to action on policy that insured's agent canceled same must be proven by insurer.**

Where the defense to an action to recover upon a fire insurance policy is that the policy was canceled by the plaintiff's agent the burden is on the defendant claiming it to show that plaintiff's agent so acted with the knowledge or authority of the plaintiff under the facts and circumstances of this case.

APPEAL by defendant from *Stack, J.*, and a jury, at February Term, 1929, of MECKLENBURG. No error.

This is an action by plaintiff against defendant to recover the sum of $1,500 on a fire insurance policy, dated 12 July, 1927, for one year, issued to him by defendant on his household goods destroyed by fire, in the city of Charlotte, on 10 December, 1927. Plaintiff contends that the policy, No. 18587, was issued by defendant through an insurance agent or broker, C. H. Williams, doing business in the city of Charlotte, and that plaintiff paid Williams the premium and he procured the policy from one Ernest Ellison, general agent of the defendant. That he had to obtain a permit to remove his household goods from the house to another in said locality and he had to get a permit. That he received said removal permit signed "by E. Todd" for defendant company, dated 15 September, 1927, and paid therefor the sum of $8.00, representing the higher rate applicable to the new location of the property covered under his policy of fire insurance.

The defendant admits it issued the policy to plaintiff through its duly authorized agent, Ernest Ellison, at the request of one C. H. Williams, acting for the plaintiff; that thereafter, to wit, on or about 15 October, 1927, the said plaintiff delivered up for cancellation to the said C. H. Williams said insurance policy, and said insurance policy, by the said C. H. Williams, agent for the plaintiff, was delivered up to the defendant's agent, Ernest Ellison, for cancellation, and was in due course by the said Ernest Ellison surrendered to this defendant and duly canceled. Defendant avers that the plaintiff never paid the premium upon said policy, and that the plaintiff voluntarily surrendered said policy to the said C. H. Williams, his own agent, with instructions to cancel the same, and that the said policy was surrendered for cancellation by the plaintiff and his authorized agent, and was canceled, and thereupon became void.

The parties stipulated as follows: "It is agreed that prior to 12 July, 1927, the plaintiff applied to C. H. Williams for certain fire insurance on plaintiff's furniture; that the said C. H. Williams applied to Ernest Ellison, the local agent at Charlotte, of the Southern Fire Insurance Company, and that said Ellison as agent of the said company issued a certain policy of fire insurance, which policy was No. 18587 in the Southern Fire Insurance Company, said policy of insurance being in the standard form and covering the furniture described in the complaint and insuring said furniture for one year from 12 July, 1927, to 12 July, 1928; that, as stated, said policy of fire insurance was delivered by the said Ellison to the said Williams; that on or about 1 November, 1927, the said Williams delivered said policy of fire insurance to the said Ellison, and the said Ellison purported to cancel said policy of fire insurance, as of 15 October, 1927. It is admitted that said policy of fire insurance covered the furniture described in the complaint, and that the plaintiff has complied with the terms of said policy in reference to filing proof of loss and giving notice. It is further admitted that C. H. Williams was holding himself out in the city of Charlotte as an insurance agent at the time this policy was written, and that when said policy was purported to be canceled said C. H. Williams' name appeared on the face of said policy."

The issues submitted to the jury and their answers thereto, were as follows:

"1. Did the defendant issue to the plaintiff a policy of fire insurance in the sum of $1,500 on plaintiff's house furniture, as alleged in the complaint? Answer: Yes.

"2. Did the plaintiff, Ralph Urey, authorize the cancellation of the said policy described in the complaint? Answer: No.

"3. What damage, if any, is the plaintiff entitled to recover of the defendant? Answer: $1,500."

The defendant made numerous exceptions and assignments of error and appealed to the Supreme Court.

C. A. Cochran, F. A. McClenaghan and Stancill & Davis for plaintiff.

Brooks, Parker, Smith & Wharton, John M. Robinson and Hunter M. Jones for defendant.

PER CURIAM. Plaintiff contends that he had paid the premium in full and that the policy was in force at the time of the fire and that he had no notice that the defendant had attempted to cancel the policy, and that he had not authorized the cancellation. There was some evidence to sustain these contentions.

The defendant admits that the policy of insurance was a standard fire insurance policy and issued in plaintiff's name.

In *Dawson v. Insurance Co.,* 192 N. C., at p. 315, 316, it is said: "It is expressly stipulated in each policy, as required by statute (1) that 'this policy will be canceled at any time at the request of the insured,' and (2) that 'the policy may be canceled at any time by the company by giving to the insured five days written notice of cancellation.' No notice of intention to cancel, or of cancellation was given to the insured by the company. Clearly, therefore, if the attempted cancellation of the policies, on 30 April, 1923, was upon the initiative of the companies, or of their agent, acting for them, it was void. It did not release the companies from their obligations under the policies; they were in force, notwithstanding such attempted cancellation, on 2 June, 1923. No contract, valid in its conception, and unobjectionable in its terms, can be canceled, without the consent of all parties, who have acquired rights thereunder. *Trust Co. v. Insurance Co.,* 173 N. C., 558. The insured, when he accepted the policy, consented that the company might thereafter cancel the policy, upon giving him notice, in writing, of five days. This provision is manifestly for the protection of the insured. The right of the company to cancel the policy exists only because of the consent of the insured, given at the time of his acceptance of the policy and thereafter to be acted upon by the company only upon strict compliance by it with the terms upon which such consent was given."

The only material question we think involved in this controversy: Was there sufficient evidence to be submitted to the jury on the second issue? "Did the plaintiff Ralph Urey authorize the cancellation of the said policy described in the complaint?"

From a careful review of the evidence, unnecessary to set forth, we think the matter resolved itself into practically a question of fact between the plaintiff and one C. H. Williams, and certain facts and circumstances corroborating the plaintiff's contention. The jury has found with the plaintiff, and we do not feel justified, from the evidence, to say that it was not sufficient to have been submitted to them for their consideration. It is admitted that defendant did not give the plaintiff 5 days written notice required by the policy to cancel same. The jury has found on sufficient evidence that Williams had no authority and the policy was not canceled at plaintiff's request.

In Cooley's Brief on Insurance, (2 ed.), Vol. 5, p. 4634, speaking to the subject and citing a wealth of authorities, it is said: "One who is authorized or employed to procure insurance does not thereby acquire any authority to cancel the policies after being procured."

The court below charged the jury: "The burden is upon the defendant to satisfy you by the greater weight of the evidence that the cancellation was authorized by Mr. Urey, the policyholder. The burden of proof is on the defendant to satisfy you that they did cancel the policy with his authority and consent." We think the charge correct under the facts and circumstances of this case. *Kendrick v. Mutual Ben. L. Ins. Co.*, 124 N. C., 315; *Page v. Insurance Co.*, 131 N. C., 115; *Roberta Mfg. Co. v. Royal Exch. Assur. Co.*, 161 N. C., 88.

It would seem that, under all the facts and circumstances of the case, just dealing would require notice, which the standard policy so wisely provides, to plaintiff of so important a matter as the cancellation of his insurance policy, but this is not for us. The jury has settled the disputed facts in plaintiff's favor. In the judgment of the court below, we find

No error.

THE GROVES MILLS, INC., v. CAROLINA & NORTHWESTERN RAILWAY COMPANY AND SOUTHERN RAILWAY COMPANY.

(Filed 12 June, 1929.)

Carriers B g—Where goods have arrived at destination and notice of arrival duly given the liability of the carrier is that of warehouseman.

Where a shipment by common carrier arrives at its destination and is placed on a platform of a station owned by another carrier and used by it and the initial carrier jointly, and notice of the arrival of the shipment is duly given, the liability of the carriers is that of warehousemen; and in this case *held*, evidence of the negligence of the carriers, resulting in the destruction of the shipment by fire, was sufficient to be submitted to the jury, and the jury might place the liability upon either one or both as they found the negligence of the parties to be from the evidence, with the burden of proof on the plaintiff to show negligence by the greater weight of the evidence.

APPEAL by defendants from *Harding, J.*, and a jury, at December Term, 1928, of GASTON. No error.

On 7 May, 1927, J. Edward Kale & Company, a cotton firm of Clarksdale, Miss., delivered to Yazoo & Mississippi Valley Railroad Company seven bales of compressed cotton, marked Teddy, and consigned to the order of A. H. Boyd, Gastonia, N. C., notify Groves Mills, Inc., Gastonia, N. C. The standard form of bill of lading was issued therefor. This cotton was carried by the initial railroad and its connecting carriers and delivered to the Carolina & Northwestern Railway Company, the defendant, at Chester, S. C., which line carried the said cotton to Gastonia, N. C. Upon the arrival of the shipment over the Carolina & Northwestern Railroad, at Gastonia, the cotton was placed upon the platform at the station of the Southern Railway Company, defendant, which station is jointly used by, and there was a joint arrangement between the Carolina & Northwestern and the Southern for unloading, receiving and handling freight over both lines.

The defendants were sued as joint *tort-feasors.* The plaintiffs contended that the 7 bales of cotton, weighing 3,747 pounds, were damaged by fire through the negligence of the defendants and plaintiff sustained a loss of ($865.60) $866.70. Defendants denied any negligence. The defendant, C. & N. Railway Company contended that if there was no negligence on its part the damage should not exceed $513.19 coming into its hands as salvage of the cotton.

The issues submitted to the jury and their answers thereto, were as follows:

"1. Was the plaintiff the owner and holder of the bill of lading for seven bales of cotton, as alleged in the complaint? Answer: Yes (by consent).

"2. Was notice of the arrival of such shipment of cotton duly given the plaintiff? Answer: Yes.

"3. When was such notice given? Answer: 23 May, 1927.

"4. Was the cotton damaged through the negligence of defendant, Carolina & Northwestern Railway Company? Answer: Yes.

"5. Was the cotton damaged through the negligence of defendant Southern Railway Company? Answer: Yes.

"6. What damage, if any, is plaintiff entitled to recover? Answer: $866.70."

Judgment was rendered on the verdict by the court below. Defendant made numerous exceptions and assignments of error and appealed to the Supreme Court.

Mangum & Denny for plaintiff.

John A. Marion and R. G. Cherry for Carolina & Northwestern Railway Company.

O. F. and Geo. B. Mason for Southern Railway Company.

PER CURIAM. The defendants, at the close of plaintiff's evidence and at the close of all the evidence, moved for judgment as in case of nonsuit. C. S., 567. The court below refused the motions and in this we think there was no error. Without repeating, in our opinion, there was sufficient evidence to go to the jury as to the negligence of both defendants.

The court below charged correctly the law of negligence and proximate cause, also as to damages, and charged, in part, as follows: "The burden is on the plaintiff to satisfy you by the greater weight of the evidence that these defendants were negligent and that such negligence was the proximate cause of the injury and damage to the cotton and if it has so satisfied you, then it would be your duty to answer the issue, Yes. If the plaintiff has satisfied you that both of these railway companies were negligent and such negligence was the proximate cause of the injury to the cotton, then you would answer the fourth and fifth issues, Yes. If the plaintiff has failed to satisfy you that both were negligent and that the negligence was the proximate cause of the injury, then you would answer the fourth and fifth issues, No. If plaintiff has satisfied you that one company was negligent, but failed to satisfy you that the other was negligent, then you would answer that issue, Yes. If plaintiff fails to satisfy you as to the negligence of either company, then you can answer both issues, the fourth and fifth issues, No. You can answer the issues Yes against the Southern and No against the C. & N. W., or you can answer the issue Yes against the C. & N. W., and No against the Southern, or both Yes or both No."

From the verdict of the jury on the second and third issues, the defendants were liable only as a warehouseman. See *Edwards v. Power Co.,* 193 N. C., 780. On this aspect, the court charged, we think, the law applicable to the facts.

The liability of a carrier for loss or damage is well stated in Moore on Carriers, (2 ed.), Vol. 1, at p. 306, as follows: "The liability of a carrier of goods is that of a common carrier, which is that of an insurer; and in cases of loss of or injury to goods intrusted to it for transportation no excuse avails such carrier, except that such loss or injury was occasioned by the act of God, or the public enemies of the State, or the sole fault of the owner or his agent. The law adjudges the carrier responsible, irrespective of any question of negligence or fault on his part, if the loss does not occur by the act of God or the public enemies. With these exceptions, the carrier is an insurer against all losses."

The case was tried carefully by the court below and from a painstaking review of the record, we can find

No error.

M. G. STAMEY, ADMINISTRATOR OF V. C. CARVER, DECEASED, v. SUNCREST LUMBER COMPANY, BUCK LANDERS AND HARVEY TYLER.

(Filed 12 June, 1929.)

Master and Servant E b—In this action under Federal Employers' Liability Act evidence held sufficient to be submitted to jury.

Under the facts of this case *Held*, contributory negligence of plaintiff's intestate, in an action against a lumber company to recover damages for the wrongful death of the intestate, caused while working on defendant's logging road, is not a bar to recovery, but was properly considered upon the question of diminution of damages, and the evidence of defendant's negligence was sufficient to be submitted to the jury and to overrule its motion as of nonsuit.

APPEAL by defendants from *Harwood, J.*, at March-April, Term, 1929, of HAYWOOD. No error.

This was an action for actionable negligence instituted by plaintiff against the defendant. The plaintiff's intestate, Virgil C. Carver, was in the employ of the defendant, Suncrest Lumber Company, as conductor and brakeman on one of defendant's log trains. The evidence on the part of plaintiff tended to show that at the time of his death, 26 August, 1927, he was engaged in the performance of his duties and in the course of his employment, assisting his coemployee, a member of the train crew, in rerailing a log car, which had been derailed. The log car in question had been loaded with logs by employees of the defendant company, commonly called the loader crew. There were no standards on this log car to prevent the logs from rolling off, and when the logs were loaded two chains were placed around part of the logs on the car at each end of said log car, and three logs, one of which was very crooked, were placed on top of said chains with nothing to hold or prevent said logs from falling or rolling from said car.

Pass Collins, witness for plaintiff, testified, in part, as follows: "I know the custom adopted by these companies with reference to how logs are chained on the cars. The custom in general, common, and approved use. On these jobs where I have worked they put chains around the logs over the top of all the logs. They loaded their cars up so far where they used the chains and then put the chains over so many of the logs and left a little sag in that, then put some more logs on the chain and tied it down then put another chain over the top of the logs to hold them. The chain over the top logs fastens in the middle of the car, in the middle of the car, in the middle of the bunk you have loaded."

While plaintiff's intestate was engaged in rerailing said log car, the same was jerked by the engineer operating said engine with such force "abrupt and quick" that one of said loose logs fell from the top of said car, striking and instantly killing plaintiff's intestate. The defendant denied any negligence and set up the plea of contributory negligence.

The defendant offered evidence tending to show that the logs were loaded on the car in the usual and customary way. That the intestate was an experienced conductor, and in full charge of the train, and that members of the train crew were required to obey his orders; that he ordered an employee to place one of the rerailers and he placed the other. That the intestate then stood at a position slightly behind the front end of the derailed car and in the way of the logs and gave the signal to the engineer, who testified that it was his duty to obey the signal, and that he did obey the signal and moved the train just as easily ahead as he could move it, and that the brakes having not been released from the derailed car skidded upon the rerailer, kicking the inside one out from under the wheel, dropping the wheel down a distance of seven or eight inches, lurching the car to one side, causing the log to roll off, striking the plaintiff's intestate, who stood right in the immediate path of the log and that he could have stood a few feet farther to the front and beside the box car and been perfectly safe. That the rerailers were put down in the usual way and properly placed and that the method of rerailing the car was the customary method and one in common and general use by all railroads.

The issues submitted to the jury and their answers thereto, were as follows:

"1. Was plaintiff's intestate killed by the negligence of the defendants, as alleged in the complaint? Answer: Yes.

"2. Did plaintiff's intestate, by his own negligence, contribute to his own death, as alleged in the answer? Answer: Yes.

"3. What damages, if any, is the plaintiff entitled to recover? Answer: $6,500."

Morgan & Ward, Zeb V. Curtis and Edwards & Leatherwood for plaintiff.

Rollins & Smathers for defendants.

PER CURIAM. The defendant, at the close of the plaintiff's evidence and at the close of all of the evidence, moved for judgment as in case of nonsuit. C. S., 567. The court below refused both motions and in this we see no error. We think the evidence sufficient to be submitted to the jury.

In the present action, contributory negligence is no bar to recovery, but mitigates, or diminishes, damages. See C. S., 3465, 3466, 3467, 3468, 3470; *Stewart v. Lumber Co.,* 193 N. C., 138.

The court below gave the contentions fairly to both sides. The law applicable to the facts was carefully and clearly stated. We find

No error.

W. K. JOHNSTON v. PHOENIX UTILITY COMPANY, H. F. LINCOLN, J. R. BASSETT, AND G. W. MORGAN.

(Filed 12 June, 1929.)

Removal of Causes C b—Action alleging joint negligence on part of resident and nonresident defendants is not removable.

An action against a nonresident corporation and its resident superintendent, brought by an employee who alleges that he was under the direction and control of the resident superintendent, and that both defendants were negligent in failing to provide a safe place to work, in changing the method of work without warning the plaintiff, in employing a dangerous method of doing the work, and in failing to warn and instruct the plaintiff as to the change of the method of work: *Held,* the complaint alleges a joint *tort,* and the petition of the nonresident defendant for removal to the Federal Court will be denied.

CIVIL ACTION, before *Harwood, J.,* at April Term, 1929, of HAYWOOD.

Plaintiff filed a complaint alleging that on 14 April, 1928, he was injured by the negligence of the defendants while engaged in making certain excavations and tunnels in and along the banks of Pigeon River. Plaintiff, who was a foreman, and the men working under him, were removing rocks that had been loosened by blasting, and the defendants were removing said rocks "some one hundred feet or more above the place where the plaintiff and the men working under him were engaged in cleaning up." The defendants removed said rocks by means of a derrick and scale pans operated by electrical power, and the plaintiff alleged that without signal, notice or warning the defendants changed the method of loading and transferring said rocks and dumped a large quantity of rock inside a coffer dam at a point directly above the place where plaintiff was working, and these rocks suddenly and with great force rolled down upon the plaintiff, causing serious and permanent injuries.

The items of negligence set up in the complaint were in substance: that the defendants failed to provide a reasonably safe place for the work, and that without warning the method of doing the work was changed so that said rocks were dumped at a point on a steep hill directly above the place where the plaintiff was required to work, and that such was a dangerous method; and furthermore, that the defendants failed to give any instruction, notice or warning to the plaintiff, and negligently failed to provide and use any system of signals to give notice of the intention to change the place of dumping said rocks.

Plaintiff further alleged that the individual defendants, including the defendant, Morgan, were citizens and residents of North Carolina.

In apt time the defendant filed a petition for removal, alleging that the defendants, Lincoln and Bassett, were nonresidents of North Carolina, but admitting that the defendant, Morgan, was a citizen and resident of North Carolina.

The trial judge upon appeal from the clerk, denied the petition for removal and retained the cause for trial in Haywood County, from which judgment the corporate defendant appealed.

Alley & Alley for plaintiff.
Harkins & Van Winkle for defendant.

PER CURIAM. The plaintiff alleged a joint cause of action against the corporate defendant and the individual defendants. The petition for removal denies that the defendants, Lincoln and Bassett, were citizens of North Carolina, but admits that the defendant, Morgan, was a citizen and resident of North Carolina. Said petition of removal further admits that said Morgan was a general foreman, and that plaintiff "was under the direct supervision of the defendant, G. W. Morgan," and "that it was the duty of the defendant, G. W. Morgan, to transmit to the several foremen on the job such orders and directions as he had received from the general superintendent . . . as well as to go from place to place on said work, see that the same was progressing according to plans and specifications, and to generally observe and report the progress made thereon."

While it is denied that Morgan was actually present at the time plaintiff was injured, it clearly appears that he was, so far as the plaintiff was concerned, the general representative or *alter ego* of the corporate defendant because he was charged with the duty of delivering instructions to the workmen and of determining whether the work was done according to plans and specifications. It further appears that the plaintiff was at the time of his injury under the direct supervision of said defendant Morgan.

Upon this state of facts the judgment is affirmed upon the authority of *Givens v. Mfg. Co.*, 196 N. C., 377.

Affirmed.

R. B. SLAUGHTER, ADMINISTRATOR OF ESTATE OF LEE DAVIS, DECEASED, v. BEMIS LUMBER COMPANY AND ROBERT HUMES.

(Filed 12 June, 1929.)

Removal of Causes C b—Action alleging joint negligence on part of resident and nonresident defendants is not removable.

An action against a nonresident corporation and its resident foreman, brought by an employee who alleges that he was under the direction and control of the resident foreman, and that both defendants were negligent in ordering the plaintiff to operate an "electrical stacker" and failing to instruct him how to use the machine which was new and not in general use, and in failing to give him a helper necessary for the safe operation, of the machine, and in failing to warn and instruct the plaintiff as to the danger incident to the work: *Held,* the complaint alleges a joint *tort,* and the petition of the nonresident defendant for removal to the Federal Court will be denied.

CIVIL ACTION, before *McElroy, J.,* at April Term, 1929, of GRAHAM.

The plaintiff alleged that his intestate, Lee Davis, was killed as the proximate result of negligence of the Bemis Lumber Company and the defendant, Robert Humes.

While it is not alleged in the complaint that the defendant, Bemis Lumber Company, is a nonresident corporation, such allegation is found in the petition for removal to the Federal Court.

It is alleged that the defendant, Robert Humes, is a citizen and resident of Graham County, and that at the time of the injury to plaintiff said Humes was yard foreman and superintendent of the corporate defendant "with full authority and power . . . to employ and discharge hands and to give specific instructions to each and every of the laborers and servants of his codefendant relative to all work and labor done and performed upon said yard. . . . That plaintiff's intestate, Lee Davis, was employed by the defendant, Bemis Lumber Company, as a common laborer . . . and by it was placed under direct control, direction and supervision of its codefendant, Robert Humes, he, the said intestate, being required to do and perform all and every duty required of him in the way and manner directed by the defendant, Robert Humes."

Plaintiff further alleged that he was required by the defendants to operate an electric stacking machine used for the purpose of stacking lumber, and that said appliance was not approved and in general use "but to the contrary was a new device still in its experimental stage. That the defendants and each of them negligently and carelessly ordered, directed and required plaintiff's intestate to operate said electrical stacker . . . without sufficient instructions . . . and without any instructions . . . and the defendants and each of them required him to attempt to load and run the same alone, when it was necessary to furnish a helper to put on the large and heavy pieces of lumber so as to keep said appliances constantly in use; and further, to give the operator of the same an opportunity to keep a lookout for his safety, but when required to work alone, as so negligently ordered by the defendants and each of them, it was impossible for the operator of said machine . . . to keep a lookout for his own safety."

Plaintiff further alleged that the defendants negligently failed to properly warn and instruct him as to the danger incident to the work.

The defendant in apt time filed a petition for removal, alleging fraudulent joinder of Robert Humes in order to prevent removal to the Federal Court.

The cause was heard by the clerk of the Superior Court, who overruled the petition and retained the case for trial in the State court.

Whereupon the nonresident defendant appealed to the judge of the Superior Court, who likewise declined to remove the cause to the Federal Court, and said defendant appealed to the Supreme Court.

Morphew & Morphew and A. Hall Johnston for plaintiff.
R. L. Phillips for defendants.

PER CURIAM. The judgment of the Superior Court is affirmed upon the authority of *Givens v. Mfg. Co.,* 196 N. C., 377. We see no substantial difference between the facts and law applicable thereto, between the case at bar and the *Givens case.*

Affirmed.

FATE LANGFORD v. KITCHEN LUMBER COMPANY.

(Filed 12 June, 1929.)

Master and Servant C b—In this case held evidence of master's negligence sufficient to be submitted to jury.

In this case held, evidence of the master's negligence in failing, in the exercise of reasonable care, to provide the servant a reasonably safe place to work and reasonably safe and suitable tools and appliances was properly submitted to the jury, and defendant's motion for judgment as in case of nonsuit was properly overruled.

APPEAL by defendant from *Harwood, J.,* at January Term, 1929, of GRAHAM. No error.

This is an action for actionable negligence brought by plaintiff against defendant.

The evidence on the part of plaintiff tended to show that under the direction of defendant's foreman he and the other employees of defendant were ordered to load rails by hand on an incline car. The steel rails were piled up on the ground about 4 feet high and were 25 to 30 feet in length and weighed 60 pounds to the foot. The rails were "crooked and wrapped up." The foreman, whom plaintiff was bound to obey or be discharged, ordered him and the other employees to load the rails by hand. Plaintiff had loaded about 5 or 6 rails before he got hurt. "Someone in the crowd spoke of rail-dogs and McCrary, the foreman, said that he did not have any and we would have to load them with our hands. . . . This rail that hit my foot had been used on the curve end that left the rails in a curve when they were racked up, and they were just piled up there, and this rail—I did not know it was crooked as it was until after I threw it out and it hit me—it bounced back on my foot. . . . By dealing you take hold of this end and swing this end out and the other will come off and then you can walk in there and pick up the rail and carry it and load it. We could not but one handle the rails because we had nothing to handle them with but our hands and just one was all that would work throwing them out."

It was in evidence that at the time plaintiff was injured, the method known, approved and in general use in the territory where plaintiff was engaged in handling steel rails and doing the work he was ordered by the foreman to do, was to use a tool called a rail-dog, or railroad tong. There was evidence that plaintiff's foot was permanently injured.

It was in evidence on the part of the defendant that the usual method was to load the rails by hand. The defendant denied negligence and set up the plea of contributory negligence.

The issues submitted to the jury and their answers thereto, were as follows:

"1. Was the plaintiff injured by the negligence of the defendant as alleged in the complaint? Answer: Yes.

"2. Did the plaintiff by his own negligence contribute to his injury? Answer: No.

"3. What damage, if any, is the plaintiff entitled to recover? Answer: $1,500."

The defendant made several exceptions and assignments of error and appealed to the Supreme Court.

T. M. Jenkins for plaintiff.
R. L. Phillips for defendant.

PER CURIAM. The major and only material assignment of error on the part of defendant, was the refusal of the court below, on motion by defendant, to dismiss the action or judgment as in case of nonsuit. C. S., 567. We think the court below gave the contentions of both parties fairly and clearly, and accurately charged the law applicable to the facts. This case is governed by a case on "all fours"—*Murdock v. R. R.,* 159 N. C., 131. There is

No error.